

*A DEADLY DILEMMA: STRATEGIC CHOICES BY ATTORNEYS  
REPRESENTING “INNOCENT” CAPITAL DEFENDANTS*

BY

WELSH S. WHITE

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**Welsh S. White\***

**I. Introduction**

Near a small, rural lake in Piedmont Alabama, Charles Jarrell killed his brother-in-law, Marty Shuler, on May 8, 1990.<sup>1</sup> In 1991 the United States indicted David “Ronnie” Chandler for capital murder under the federal death penalty statute, claiming that Chandler was a drug kingpin who had hired Jarrell to kill Shuler.<sup>2</sup> Subsequently, Chandler retained Drew Redden, an able and experienced criminal defense attorney,<sup>3</sup> to defend him at trial.<sup>4</sup> The events that followed illustrate a problem that frequently arises when an attorney is representing a capital defendant who has a strong claim of innocence.

Redden immediately began preparing Chandler’s case.<sup>5</sup> After interviewing “at least 67 witnesses” in the Piedmont area, Redden determined that the Government’s case against

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<sup>1</sup>Chandler v. United States, 218 F.3d 1305, 1310 (11th Cir. 2000).

<sup>2</sup>Chandler, 218 F.3d at 1310.

<sup>3</sup>At the time Chandler hired him, Redden had tried over 1000 cases. *Id.* at 1310 n.3. He was both a former prosecutor at the U.S. Attorney’s Office and President of the Alabama Bar, a member of the American College of Trial Lawyers and the International Society of Barristers, listed in *America’s Best Lawyers* “for his criminal defense work,” and described as “an extremely talented defense counsel, probably the best in the state.” *Id.*

<sup>4</sup>*Id.*

<sup>5</sup>Chandler, 218 F.3d at 1310.

Chandler was weak.<sup>6</sup> He thus “actively pursued an acquittal”<sup>7</sup> at trial and did not prepare for the penalty trial which would take place only if Chandler was convicted of the capital murder charge.<sup>8</sup>

At trial, Jarrell, the Government’s chief witness, testified that Chandler had offered him \$500 to kill Shuler, whom Chandler believed to be a police informant.<sup>9</sup> Jarrell said that he accepted this offer, received a gun from Chandler, and drove Shuler to Snow’s Lake where the two engaged in target practice before Jarrell shot Shuler twice, killing him.<sup>10</sup> Jarrell claimed that he then met Chandler and they hauled “Shuler’s body away for burial.”<sup>11</sup>

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<sup>6</sup>*Id.*

<sup>7</sup>*Id.*

<sup>8</sup>Capital punishment cases are conducted according to a bifurcated trial procedure: first, there is a guilt trial at which the jury determines whether the defendant is guilty of any of the offenses with which he is charged; if the jury finds the defendant guilty of a capital offense, there is then a penalty trial at which the jury decides whether the defendant will be sentenced to death or a lesser punishment. Although the precise issues to be determined at the penalty trial vary from jurisdiction to jurisdiction, the penalty jury invariably makes its sentencing determination after considering aggravating factors introduced by the prosecution and mitigating evidence relating to the defendant’s character or the circumstances of the offense introduced by the defense. *See generally* Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 306 (providing examples of capital sentencing statutes).

<sup>9</sup>*Chandler*, 218 F.2d at 1310.

<sup>10</sup>Bill Rankin, *Seeking Justice on Death Row; Inmate Fights for Life After Testimony is Recanted in Federal Drug Kingpin Case*, ATLANTA J. & CONST., Oct. 25, 1998, at 14A.

<sup>11</sup>*Id.*

Redden impeached Jarrell's testimony by showing he had made several "inconsistent statements."<sup>12</sup> When first arrested, Jarrell stated that he had not killed Shuler.<sup>13</sup> Later he said that he accidentally shot Shuler,<sup>14</sup> and then that he had murdered him out of "personal animosity."<sup>15</sup> Finally, after receiving the Government's promise that, in exchange for his testimony, neither he nor his son would be prosecuted for killing Shuler,<sup>16</sup> Jarrell implicated Chandler in the murder.<sup>17</sup>

Redden also attempted to attack Jarrell's testimony through the introduction of other evidence. He showed that Jarrell never received \$500 from Chandler<sup>18</sup> and had consumed 23 beers just before shooting Shuler.<sup>19</sup> In addition, Redden presented evidence showing that Jarrell's motive for killing Shuler was his anger over Shuler's abuse of his wife, who was Jarrell's sister. Jarrell even admitted that less than a year before he killed Shuler he had attempted to kill his brother-in-law because of the escalating abuse. At that time, he told Shuler "he was going to kill him" and then placed a "pistol against Shuler's

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<sup>12</sup>*Chandler*, 218 F.3d at 1310.

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 1311.

<sup>16</sup>Rankin, *supra* note 10.

<sup>17</sup>*Chandler*, 218 F.3d at 1311.

<sup>18</sup>*Id.* at 1310.

<sup>19</sup>Rankin, *supra* note 10.

nose and pulled the trigger.”<sup>20</sup> At Chandler’s trial, Jarrell told the jury that “[t]he Lord didn’t intend for [Shuler] to die that night.”<sup>21</sup>

Although the government’s murder charge depended almost entirely on Jarrell’s testimony, the jury convicted Chandler of capital murder, thus setting the stage for the penalty trial.<sup>22</sup> The verdict shocked Redden.<sup>23</sup> He had expected an acquittal and had done nothing “to prepare for the sentencing phase of the trial.”<sup>24</sup> In a last minute attempt to save his client’s life, Redden asked “Chandler’s wife . . . to round up witnesses who could speak up for Chandler” at the penalty trial, which was to begin the following day.<sup>25</sup> Extremely distraught, she could identify only her preacher.<sup>26</sup>

At sentencing, Redden’s primary argument was that the jury should not impose the death sentence because of its lingering doubt as to Chandler’s guilt. He also brought out that the defendant had no prior convictions and called his wife and mother to testify as mitigating witnesses.<sup>27</sup> In rebuttal, the prosecutor reminded the jury that even Charles

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<sup>20</sup>*Id.*

<sup>21</sup>*Id.*

<sup>22</sup>*Chandler*, 218 F.3d at 1310.

<sup>23</sup>Bill Rankin, *THE LAW Pot Dealer May Be 1st Executed as ‘Drug Kingpin’*, ATLANTA J. & CONST., Jan. 23, 1994, at G1.

<sup>24</sup>Bill Rankin, *Hard Times for Death Row Appeals?*, ATLANTA J. & CONST., July 31, 2000, at 1A

<sup>25</sup>Rankin, *supra* note 10.

<sup>26</sup>*Id.*

<sup>27</sup>Rankin, *supra* note 10.

Manson and “Jack the Ripper had a mother.”<sup>28</sup> The jury unanimously recommended that Chandler “be sentenced to death.”<sup>29</sup>

Later, Chandler sought to vacate his death sentence on the ground that he did not receive effective assistance of counsel at sentencing. Specifically, he claimed that Redden’s representation was unreasonable because he failed to “investigate and . . . present character evidence” at sentencing.<sup>30</sup> Chandler’s new attorney presented 27 witnesses who testified to numerous occasions on which Chandler had assisted others who were in need of help. Martha Heath, for example, testified that Chandler bought her son two new pairs of shoes after seeing him running shoeless “around Piedmont’s projects.”<sup>31</sup> Elaine Freeman testified that Chandler gave her neighbor’s family money to pay for their son’s burial when he died in an auto accident.<sup>32</sup> Jerry Masters testified that Chandler helped erect a fellowship hall at [a] church and “didn’t charge a penny.”<sup>33</sup> Others testified that Chandler built a porch so a disabled man could enter and exit his house, gave needy mothers bags of groceries, and donated heavily to charities.<sup>34</sup> Chandler claimed that Redden’s failure to do the investigation necessary to find these witnesses so that their testimony could be presented at the penalty trial constituted

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<sup>28</sup>*Id.*

<sup>29</sup>*Chandler*, 218 F.3d at 1312.

<sup>30</sup>*Chandler*, 218 F.3d at 1313 n.8.

<sup>31</sup>Rankin, *supra* note 10.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* For other mitigating evidence presented at the hearing, see *Chandler*, 218 F.3d at 1312 n.8.

deficient performance, thus satisfying the first prong of *Strickland v. Washington*'s test for ineffective assistance of counsel.<sup>35</sup>

The Eleventh Circuit, in a 6-5 decision, rejected Chandler's claim. The court concluded that "focusing on acquittal at trial and then on residual doubt at sentencing (instead of other forms of mitigation) can be reasonable . . . especially when . . . the evidence of guilt [is] not overwhelming."<sup>36</sup> As the Government did not possess a strong case against Chandler, the court held that Redden acted reasonably.<sup>37</sup> His decision to vigorously seek an acquittal at the expense of an investigation into mitigating evidence did not fall "outside the wide range of professionally competent assistance."<sup>38</sup> The Court thus affirmed Chandler's death sentence.

After Chandler's death sentence was affirmed, Jarrell admitted that his testimony at Chandler's trial had been false.<sup>39</sup> Nevertheless, Chandler's subsequent efforts to obtain relief from the courts have been unsuccessful.<sup>40</sup> In 2001, however, President Clinton

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<sup>35</sup>In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court held that in order to establish ineffective assistance of counsel a defendant must establish both that his attorney's representation "fell below an objective standard of reasonableness," 466 U.S. at 688, and that the defendant was "prejudiced" by his attorney's deficient performance. *Id.* at 692.

<sup>36</sup>*Chandler*, 218 F.3d at 1320.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 1327.

<sup>39</sup>The Birmingham News, State Briefs, BIRMINGHAM NEWS, Feb. 23, 2001, at Neighborhoods.

<sup>40</sup>*Id.*

commuted his death sentence to a sentence of life imprisonment without the possibility of parole.<sup>41</sup>

Chandler's case has attracted substantial media attention because of the doubts as to Chandler's guilt.<sup>42</sup> Over the past decade, the surprisingly large number of cases in which defendants sentenced to death have been exonerated<sup>43</sup> has precipitated concern relating to the extent to which innocent defendants are sentenced to death. Cases like Chandler's suggest that the cases in which defendants on death row have been exonerated through DNA-testing<sup>44</sup> or other evidence sufficient to meet the strict standard generally

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<sup>41</sup>*Id.*

<sup>42</sup>*See, e.g.,* AMERICAN JUSTICE: MARIJUANA AND MURDER (A&E television broadcast, Sept. 19, 2001) (recounts the events leading to Chandler's conviction as well as the important events that followed—i.e., Jarrell's recantation, the 11th Circuit's affirmation of Chandler's death sentence, and former President Clinton's commutation of that sentence).

<sup>43</sup>Determining the number of defendants sentenced to death who were actually innocent in the sense that they had no involvement in the crime with which they were charged is, of course, difficult. Barring unusual circumstances, a court that reverses the conviction of a defendant sentenced to death does not even attempt to determine the defendant's actual guilt or innocence. In a surprising number of cases, however, DNA or other evidence has provided seemingly conclusive proof that defendants sentenced to death were innocent of the capital offense for which they were convicted. *See, e.g.,* James S. Liebman, *The New Death Penalty Debate: What's DNA Got To Do With It?*, 33 COL. HUM. RTS. L. REV. 527, 537 (2002) (observing that in November, 1998, a conference held at Northwestern University "brought national attention to the fact that, as of then, seventy-five men and women whom American juries had sentenced to die . . . had been exonerated as innocent"). Since 1973, evidence of a defendant's innocence has freed 111 people from death row. *Death Penalty Info. Ctr., Innocence and the Death Penalty*, available at <http://www.deathpenaltyinfo.org/article.php?did=412&scid=6> (current as of July 28, 2003).

<sup>44</sup>Since 1973, twelve people have been exonerated and released from death row by DNA evidence. Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333, 337 (2002).



required to convince a court of the defendant's innocence<sup>45</sup> could be just the tip of the iceberg. There may be many other cases in which innocent defendants sentenced to death

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<sup>45</sup>When a defendant who claims she was wrongfully convicted seeks relief through the appellate process, she is likely to encounter formidable obstacles. See Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1271 (2001). Appellate courts do not have the authority to hear new evidence, and most such courts cannot "reverse a conviction because they believe that the jury was wrong." *Id.* These courts can review an alleged wrongful conviction, but they must do so on the grounds that the trial court convicted the appellant on insufficient evidence. *Id.* When doing so, the court may examine only record evidence and must view that "evidence in the light most favorable to the prosecution." *Id.* They must then determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

Convicted defendants may also seek a "new trial based on newly discovered evidence." *Id.* at 1292. However, such trials are "rarely granted" due to "severe time limitations" and the need to "show a very high probability of success on the merits." *Id.* In federal courts, for example, Rule 33 of the *Federal Rules of Criminal Procedure* requires that a motion for a new trial "be made within three years of final judgment." *Id.* at 1292-93. The rule also requires a court to grant "a new trial . . . only where: (1) the [new] evidence . . . [has] been discovered since the trial; (2) the party seeking the new trial . . . [has shown] diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on [is] not . . . merely cumulative or impeaching; (4) the evidence [is] . . . material to the issues involved; and (5) [the evidence is] of such [a] nature that in a new trial it would probably produce an acquittal." *Id.* at 1293.

If these remedies fail, a defendant who claims who was wrongfully convicted has two other options: she may file a writ of habeas corpus in federal court, or seek executive clemency. Habeas corpus provides only a slim chance of relief because the Supreme Court, in *Herrera v. Collins*, 506 U.S. 390 (1993) "drastically limited the right of a convicted defendant to invoke [it] based on a claim of actual innocence." *Id.* at 1295. Even if a defendant would otherwise qualify for habeas relief, moreover, she still has to surmount the new barriers imposed by the Antiterrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. §§ 2244-2267 (1996). See generally James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOKLYN L. REV. 411, 415-18 (2001) (discussing the obstacles posed by AEDPA for wrongfully convicted capital defendants).

Even when a defendant can show that it is likely she was wrongfully convicted, obtaining executive clemency is generally difficult. In most jurisdictions, the clemency power is "entirely discretionary" and subject to the "political process." Griffin, *supra* at 1299. As there is no constituency "favoring the release of convicted criminals," *id.*, executive clemency is unlikely to be granted unless the defendant can make a compelling showing that she was wrongfully convicted.

are unable to obtain relief because they are unable to produce evidence that will be sufficient to establish their innocence.<sup>46</sup> The *Chandler* case thus exemplifies a situation in which a possibly innocent defendant who is sentenced to death is unable to obtain relief from the courts.

But the *Chandler* case is also significant because of the strategic problems it presented for Chandler's lawyer. When a lawyer is representing a capital defendant who has a strong claim of innocence, how should the lawyer allocate her resources in

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<sup>46</sup>With respect to criminal convictions in general, one National "study suggests that 'the extent of factually incorrect convictions in our system must be much greater than anyone wants to believe.'" Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1357 (1997). Although one might hope that fewer mistakes would be made in capital cases in which the death penalty is imposed, knowledgeable authorities, including judges who have had first hand experience with capital trials, indicate that this is not the case. For example, an Illinois Supreme Court Justice stated:

Despite the courts' efforts to fashion a death penalty scheme that is just, fair, and reliable, the system is not working. Innocent people are being sentenced to death. . . . If [some wrongly convicted] men dodged the executioner, it was only because of luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release. They survived despite the criminal justice system, not because of it. The truth is that, left to the devices of the court system, they would probably have all ended up dead at the hands of the state for crimes they did not commit. One must wonder how many others have not been so fortunate.

*Illinois v. Bull*, 705 N.E.2d 824, 847 (Ill. 1998) (Harrison, J., concurring and dissenting in part).

Similarly, pointing to the "exonerations of more than 100 people on death row based on DNA and other evidence," Judge Wolf, a federal judge who was a former federal prosecutor and official in the Justice Department, stated that "innocent individuals are sentenced to death, and undoubtedly executed, much more often than previously understood." Adam Liptak, *U.S. Judge Sees Growing Signs that Innocent Are Executed*, N.Y. TIMES, Aug. 12, 2003, at A12.

preparing for the guilt and penalty phases<sup>47</sup> of the capital case? Should she expend resources in preparing for a penalty trial which will take place only if the defendant is convicted of the capital offense at the guilt trial? Or should she focus entirely on trying to show the defendant's innocence at the guilt trial? And, if the defendant is convicted of the capital offense, what strategy should she pursue at the penalty trial? Should she focus primarily on reasserting the defendant's claim of innocence, seeking to convince the jury that they should spare the defendant because of their lingering doubt as to his guilt? Or should she accept the jury's verdict at the guilt stage and focus primarily on introducing mitigating evidence that will explain the defendant's background to the jury?

Chandler's attorney's decision to focus primarily on obtaining a favorable verdict is not unusual, especially for criminal defense attorneys with limited experience in representing capital defendants. Like Chandler's attorney, these attorneys may believe that preparing for the penalty trial will be unnecessary because the defendant will not be convicted of the capital offense at the guilt trial. In addition, because the attorney is seeking to maximize the defendant's chances at the guilt trial, she may decide that investigating for mitigating evidence to be introduced at the penalty trial will not be an optimal use of her limited resources. Even if the attorney believes there is some chance that the defendant will be convicted of the capital offense and that introducing mitigating evidence at the penalty trial could be valuable, she may still believe that the proper overall strategy is to focus almost entirely on maximizing the defendant's chances at the guilt trial. When the attorney adopts this strategy, her options at the penalty trial (if it occurs) will generally be limited. In most cases, the failure to investigate for mitigating

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<sup>47</sup>For an explanation of the guilt and penalty phases of a capital trial, see note 8, *supra*.

evidence prior to trial will make it impossible to introduce significant mitigating evidence at the penalty trial. Since the penalty trial usually takes place immediately after the jury adjudicates the defendant guilty of the capital offense, the defense will generally not have sufficient time between the guilty verdict and the beginning of the penalty trial to conduct the kind of investigation that would produce persuasive mitigating evidence.

In other cases, either the defendant's wishes or the lawyer's view of the significance of the defendant's claim of innocence may shape the lawyer's strategy. A defendant who has a strong claim of innocence may be especially likely to tell his attorney that, in the event there is a penalty trial, no mitigating evidence should be presented. If the lawyer believes the client has a strong claim of innocence, moreover, she may believe that seeking mitigating evidence is unnecessary because, even if the defendant is convicted, the best strategy at the possible penalty trial will be to focus exclusively on reasserting the defendant's claim of innocence. A lawyer familiar with death penalty scholarship, moreover, may justify this strategy by pointing to empirical studies which show that a jury's lingering doubt as to the defendant's guilt is the factor that will most strongly lead them to spare the defendant's life.<sup>48</sup> Based on these studies, the lawyer may assert that in appropriate cases it is best to argue solely on the basis of lingering doubt, thus maximizing the likelihood that the jury will spare the defendant's life on the basis of this factor.

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<sup>48</sup>See, e.g., William Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 51-52 (1994) (interviews from jurors in 10 Florida cases indicated that jurors' lingering doubt as to the defendant's guilt was the most important factor to jurors who voted for life imprisonment). See generally Scott Sundby, 83 CORNELL L. REV. n.44 (Summarizing data relating to lingering doubt).

For more than two decades, however, experienced capital defense attorneys have recognized that introducing mitigating evidence that explains the defendant's background and history to the penalty jury is generally the best way to dissuade the jury from imposing a death sentence.<sup>49</sup> As the Supreme Court observed in *Wiggins v. Smith*<sup>50</sup> the 1989 ABA Standards provide that an attorney representing a capital defendant has an obligation to investigate for "all reasonably available mitigating evidence" prior to trial.<sup>51</sup> In view of these established professional norms, under what circumstances, if any, can a defense attorney representing a capital defendant with a strong claim of innocence reasonably conclude that she need not conduct an investigation for such evidence? And when the attorney makes this decision, under what circumstance will her failure to investigate constitute ineffective assistance of counsel?

Although one might think that the answers to these two questions would be the same, the Court's decisions in *Strickland* and its progeny indicated otherwise. In determining whether a capital defense attorney's failure to investigate for or to introduce mitigating evidence at a penalty trial is ineffective representation, courts must apply *Strickland v. Washington*'s two prong test<sup>52</sup> for determining whether counsel was ineffective. As to the first prong—whether the attorney's representation "fell below an

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<sup>49</sup>See Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care* 1993 U. ILL. L. REV. 323, 341-42, 361 (1993) [hereinafter White, *Effective Assistance*]; Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323-24, 335-37 (1983).

<sup>50</sup>123 S. Ct. 2527, 2537 (2003).

<sup>51</sup>AMERICAN BAR ASSOCIATION, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 11.4.1(c), 93 (1989).

<sup>52</sup>For an explanation of *Strickland*'s two prong test, see note 35, *supra*.

objective standard of reasonableness,”<sup>53</sup> *Strickland* provided guidelines that require courts to afford substantial deference to an attorney’s strategic choices. As to a capital defense attorney’s decisions with respect to presenting mitigating evidence, the Court said that strategic choices made after a full investigation of the facts and law are “virtually unchallengeable” and that “choices made after less than complete investigation are reasonable” if “reasonable professional judgments support the limitations on investigation.”<sup>54</sup> The Court added, moreover, that counsel’s performance must be judged on the basis of “information supplied by the defendant.”<sup>55</sup> Applying these standards, lower courts have frequently held that strategic choices not to seek or not to present mitigating evidence at the penalty trial will not be deficient performance when they are based on either instructions from the defendant<sup>56</sup> or the attorney’s view as to the importance of reasserting the defendant’s claim of innocence at the penalty trial.<sup>57</sup>

In *Wiggins v. Smith*,<sup>58</sup> however, the Court made it clear that at least in some situations a capital defendant’s attorney’s failure to investigate for mitigating evidence cannot be justified by a strategic decision to focus primarily on reasserting the

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<sup>53</sup>*Strickland*, 466 U.S. at 688.

<sup>54</sup>*Id.* at 690-91.

<sup>55</sup>*Id.* at 691.

<sup>56</sup>*See, e.g.*, *Frye v. Lee*, 235 F.3d 897 (4th Cir. 2000); *Coleman v. Mitchell*, 244 F.3d 533 (6th Cir. 2001); *Hayes v. Woodford*, 301 F.3d 1054 (9th Cir. 2002); *Mitchell v. Kemp*, 762 F.2d 886 (11th Cir. 1985); *Williams v. Calderon*, 41 F. Supp. 2d 1043 (C.D. CA 1998); *Zagorski v. Tennessee*, 983 S.W.2d 654 (Tenn. 1998).

<sup>57</sup>*See, e.g.*, *Parker v. Sec’y for the Dep’t of Corrs.*, 331 F.3d 764 (11th Cir. 2003); *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000); *Tarver v. Hopper*, 169 F.3d 710 (11th Cir. 1999); *United States v. Kokoraleis*, 963 F. Supp 1473 (N.D. Ill. 1997).

<sup>58</sup>123 S. Ct. 2527 (2003).

defendant's claim of innocence at the penalty trial. Although *Wiggins*' scope is unclear, the Court's analysis indicated that in evaluating a capital defendant's attorney's performance, the practices of experienced capital defense attorneys, as reflected in professional standards such as the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, will at least sometimes provide the norms against which the attorney's performance must be measured. In assessing the reasonableness of strategic choices by attorneys representing defendants with strong claims of innocence, it is thus appropriate to illuminate these norms through examining and explaining strategic choices made by defense attorneys who specialize in capital cases.

In this article, I will contrast the choices of experienced attorneys with those made by less experienced attorneys, and assess *Wiggins*' possible impact on the question of whether the latter choices constitute deficient performance under the first prong of the *Strickland* test. Broadly stated, my thesis is that, in representing capital defendants with a strong claim of innocence, certain axioms that govern the practices of experienced capital defense attorneys should be viewed as professional norms; and, in most instances, a capital defense attorney's failure to comply with these norms should constitute deficient performance within the meaning of *Strickland*.

In developing this thesis, the article proceeds as follows: Part II considers the potential impact of *Wiggins v. Smith*. After briefly explaining *Wiggins*' holding, this Part identifies and discusses three situations of particular concern to attorneys representing capital defendants with strong claims of innocence in which *Wiggins*' application is unclear. Parts III and IV then seek to illuminate the appropriate standard of care for attorneys representing capital defendants with strong claims of innocence by considering

empirical data bearing on how attorneys with varying levels of experience deal with strategic choices relating to the penalty trial when they are representing such defendants. Part III addresses strategic choices that arise when a defense attorney representing a capital defendant with a strong claim of innocence is preparing for the penalty trial, focusing especially on decisions that are influenced by the attorney's view of her resources or the instructions she has received from the capital defendant. Part IV addresses strategic choices that arise when the attorney is deciding what type of mitigating evidence should be presented at the penalty trial, focusing first on the circumstances under which the attorney should argue lingering doubt to the penalty jury, and then on the effect that the attorney's decision to argue lingering doubt should have on her strategy with respect to introducing mitigating evidence. In order to provide a nuanced account of experienced attorneys' practices with respect to these issues, I draw upon interviews with experienced capital defense attorneys<sup>59</sup> and penalty trial transcripts<sup>60</sup> that reveal the ways in which they implemented their strategic choices.

Drawing from various sources, including the material presented in Parts III and IV, Part V seeks to define the professional norms that should govern defense attorneys' strategic choices when they are representing capital defendants with strong claims of innocence. As I have indicated, my thesis is that these norms should not only serve as

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<sup>59</sup>In preparing this article, I have interviewed 12 criminal defense attorneys, most of whom have had extensive experience in defending capital defendants, and two mitigation experts who have had extensive experience in providing social histories (based on investigations for mitigating evidence) for capital defendants. When I rely on specific information provided by any of these people, the name of the person interviewed and the date of the interview appears in the footnote.

<sup>60</sup>The penalty trial transcripts referred to (as well as others not quoted) were sent to me by attorneys or mitigation experts involved in the cases. These transcripts are on file with the author.



guides to defense attorneys but also as the standards that must be met when the attorney's performance is being measured against the first prong of the *Strickland* test. In Part VI, I conclude by commenting on some of the broader implications of the issues discussed in the article.

## **II. *Wiggins v. Smith's* Impact on Counsel's Strategic Choices**

In *Wiggins v. Smith*<sup>61</sup> the Court considered an ineffective assistance of counsel case in which the reasonableness of a capital defendant's attorneys' decision to curtail investigation for mitigating evidence was at issue. The government sought to justify the attorneys' failure to conduct a full investigation for mitigating evidence on the ground that the attorneys had made a tactical choice to focus their penalty trial strategy entirely on relitigating the defendant's guilt. The Court's refusal to accept the government's position may have a significant impact in other cases where capital defense attorneys' strategic choices are animated by a decision to focus on lingering doubt or other innocence claims at the penalty trial. *Wiggins'* attorneys' strategic choice was made under unusual circumstances, however. In assessing *Wiggins'* immediate and long-term impact, it is thus necessary first to explain the Court's holding and then to identify three issues that the Court's opinion left unresolved.

### **A. The *Wiggins* Decision**

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<sup>61</sup>*Id.*

Kevin Wiggins was charged with the murder of Florence Lacs, a 77-year-old woman who was found drowned in the bathtub of her ransacked apartment in Woodlawn, Maryland on September 17, 1988.<sup>62</sup> Ms. Lacs was last seen alive on the afternoon of September 15 when a government witness said Wiggins thanked her for watching his Sheetrock.<sup>63</sup> Geraldine Armstrong, Wiggins' girlfriend, testified that Wiggins picked her up at about 7:45 p.m. on September 15. At that time, Wiggins was driving Ms. Lacs' Chevette and was in possession of her credit card, which Wiggins and Armstrong used when they went shopping that evening and the next day.<sup>64</sup> When Wiggins was arrested, he told the police that he had found Ms. Lacs' car with the keys in it in a restaurant parking lot on September 16 and that Armstrong "didn't have anything to do with this."<sup>65</sup> The government also sought to establish through expert testimony and other evidence that Ms. Lacs had been murdered on September 15, the same day on which Wiggins had been seen in the vicinity of her apartment.<sup>66</sup>

The government's case was thus based primarily on evidence that Wiggins was seen near the victim's apartment shortly before the time of her murder and had possession

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<sup>62</sup>*Id.* at 2531-32.

<sup>63</sup>*Wiggins v. Corcoran*, 288 F.3d 629, 633 (4th Cir. 2002).

<sup>64</sup>*Id.* at 634.

<sup>65</sup>*Id.*

<sup>66</sup>The medical examiner testified that the victim had been murdered and that the time of death could have been September 15. In addition, a friend of the victim's testified that on September 15 the victim had been wearing the clothes that were found on her murdered body on September 17. And Wiggins' employer testified that Wiggins had been working near the defendant's apartment on the afternoon of September 15. *Id.* at 632-34.

of property taken from her apartment after the time of the murder.<sup>67</sup> No eyewitnesses or forensic evidence supported the government's claim that Wiggins had been in Ms. Lacs' apartment on September 15. On the other hand, an unidentified finger-print was found in the apartment and the police did have other possible suspects, especially Armstrong's brother who lived just below Ms. Lacs' apartment.<sup>68</sup>

The defense sought to refute the government's case by showing that Ms. Lacs was not dead when Wiggins was shown to be in possession of the property taken from her apartment. To establish this claim, Dr. Kaufman, an expert in forensic pathology, testified that, "within a reasonable degree of medical certainty, Mrs. Lacs' time of death was no earlier than 3 a.m. on Saturday, September 17."<sup>69</sup> If Ms. Lacs had not been killed until September 17, the government's case against Wiggins was obviously insufficient to establish his guilt.<sup>70</sup>

The defense had elected to have the defendant's guilt determined by a judge sitting without a jury. The judge rejected Dr. Kaufman's conclusion as to the time of Ms. Lacs' death. He then concluded that Wiggins' possession of property taken from a

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<sup>67</sup>In addition, two inmates testified that Wiggins confessed to the murder while incarcerated; in arriving at a verdict, however, the trial judge indicated that he did not believe either of these inmates. *Wiggins v. Corcoran*, 288 F.3d 629, 634 (4th Cir. 2002).

<sup>68</sup>See *Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 554 n.9, 557 (D. Md. 2001).

<sup>69</sup>*Id.* at 555.

<sup>70</sup>Even if the government's evidence relating to Ms. Lacs' time of death was accepted, the government's case against Wiggins was weak. Indeed, the federal district judge who considered the case on habeas concluded that Wiggins was entitled to relief on the ground that "no rational finder of fact could have found Wiggins guilty of murder beyond a reasonable doubt." *Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 554 (D. Md. 2001).

recently murdered victim combined with the other circumstantial evidence was sufficient to establish his guilt beyond a reasonable doubt.<sup>71</sup>

The defense chose to have Wiggins' penalty trial before a jury. In order to obtain a death sentence, the government had to prove that Wiggins was a "principal in the first degree," meaning that he actually killed Ms. Lacs<sup>72</sup> and that the aggravating factors outweighed the mitigating factors.<sup>73</sup> One month prior to the scheduled beginning of the penalty trial, defense counsel filed a motion for bifurcation of the penalty trial so that the defense could first present evidence showing that Wiggins did not kill Ms. Lacs and then, if necessary, present a mitigation case. The defense claimed that "separating the two cases would prevent the introduction of mitigating evidence from diluting their claim that Wiggins was not directly responsible for the murder."<sup>74</sup>

About a month later, the judge denied the defense's bifurcation motion and the penalty trial began. In her opening statement, one of Wiggins' two defense attorneys told

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<sup>71</sup>In reaching this verdict, the trial judge relied on five factual findings: (1) Wiggins was in the vicinity of the apartment at the time of the murder; (2) he gave a false statement to the police about the stolen goods; (3) he knew the victim; (4) the victim was wearing the same clothes on the September 15 as she was when she was found dead on September 17; (5) the victim's apartment had been ransacked. See *Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 555-56 (2001).

<sup>72</sup>Under Maryland's capital sentencing statute, the jury may not impose the death penalty unless it first concludes that the defendant was a "principal in the first degree." MD. CODE ANN., [Criminal Law] § 2-202(a)(2)(i) (2002). Under Maryland law, "[a] principal in the first degree is one who actually commits a crime, either by his own hand, or by an inanimate agency, or by an innocent human agent." *State v. Ward*, 396 A.2d 1041, 1046-47 (Md. 1978).

<sup>73</sup>MD. CODE. ANN., [Criminal Law] § 2-203(i)(2)(i) (2002) (Jury must determine by a preponderance of the evidence that the aggravating circumstances outweigh the mitigating evidence.).

<sup>74</sup>*Wiggins*, 123 S. Ct. at 2532.

the jury they would “hear evidence suggesting that someone other than Wiggins actually killed Lacs.”<sup>75</sup> She also told them they were going to hear evidence relating to Wiggins’ life and that he had “had a very difficult life.”<sup>76</sup> During the penalty trial, however, the defense introduced no evidence relating to Wiggins’ life history.<sup>77</sup> Instead, it again introduced expert testimony attacking the government’s theory as to Ms. Lacs’ time of death. In essence, the defense sought to convince the jury that Wiggins could not have “actually killed” the victim because he was not guilty of her murder.

At the conclusion of the penalty trial, the judge instructed the jury that Wiggins had been convicted of the first degree murder of Ms. Lacs and that they were required to accept that conviction as “binding” even if they believed it “to have been in error.”<sup>78</sup> He then explained the standard for determining whether Wiggins was a “principal in the first degree” and instructed them that, if they found that Wiggins was a “principal in the first degree,” they should determine whether the death penalty should be imposed by weighing the aggravating and mitigating factors.<sup>79</sup> The jury imposed a death sentence.

Wiggins claimed that his trial attorneys were ineffective because of their failure to conduct a full investigation for mitigating evidence relating to Wiggins’ personal history. Wiggins’ attorneys had obtained some information relating to his background, including a presentence investigation report prepared by the Division of Parole and Probation and

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<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>*Id.*

<sup>78</sup>*Wiggins v. Smith*, Joint Appendix of Petitioner and Respondent 369.

<sup>79</sup>*Id.*

DSS records “documenting [Wiggins’] various placements in the State’s foster care system.”<sup>80</sup> They had not, however, retained a forensic social worker to prepare a full compilation of Wiggins’ social history, even though funds for that purpose were available.<sup>81</sup> Wiggins’ senior attorney explained that the attorneys had decided, well in advance of trial, “to focus their efforts on ‘retrying the factual case’ and disputing Wiggins’ direct responsibility for the murder.”<sup>82</sup> They thus believed that compiling a social history was unnecessary because they did not want to present a shot-gun defense which might dilute the force of the evidence disputing Wiggins’ responsibility.

The Maryland State courts rejected Wiggins’ ineffective assistance of counsel claim, concluding that his attorneys had made a “deliberate tactical” decision to concentrate their efforts on convincing the penalty jury that Wiggins was not responsible for the murder.<sup>83</sup> Wiggins challenged this ruling in a federal writ of habeas corpus. In view of the applicable federal habeas statute,<sup>84</sup> the issue before the Supreme Court was whether the Maryland State courts’ ruling denying Wiggins’ ineffective assistance of counsel claim was an “unreasonable application of clearly established federal law.”<sup>85</sup> In order to establish this, Wiggins first had to show that his attorneys’ decision to curtail

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<sup>80</sup>*Wiggins*, 123 S. Ct. at 2536.

<sup>81</sup>*Id.* at 2533.

<sup>82</sup>*Id.*

<sup>83</sup>*Id.*

<sup>84</sup>28 U.S.C. § 2254 (1996).

<sup>85</sup>*Wiggins*, 123 S. Ct. at 2534 (citing 28 U.S.C. § 2254(d)(1)(1996)).

investigation so that they did not have Wiggins' complete social history was deficient performance under the first prong of the *Strickland* test.<sup>86</sup>

In *Strickland*, the Court had said that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”<sup>87</sup> The Court thus had to determine whether Wiggins' attorneys' strategy of curtailing investigation so as to focus on relitigating the defendant's guilt was reasonable.

In addressing this issue, Justice O'Connor's majority opinion focused on a capital defense attorney's obligation to investigate for mitigating evidence. Justice O'Connor stated that Wiggins' attorneys' decision to curtail the investigation “fell short of the professional standards that prevailed in Maryland in 1989” because “standard practice in Maryland in capital cases” at that time “included the preparation of a social history report.”<sup>88</sup> She indicated, moreover, that Wiggins' attorneys' decision could not be attributed to lack of resources because “the Public Defender's office made funds available for the retention of a forensic social worker” who would prepare the necessary report.<sup>89</sup>

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<sup>86</sup>In addition, Wiggins had to show that his attorney's deficient performance constituted prejudice under the second prong of the *Strickland* test. See note 35, *supra*. In order to obtain relief under § 2254(d)(1), moreover, Wiggins had to show that the Maryland state court's conclusion that the defendant had not established that his attorney's performance was deficient constituted an “unreasonable application of federal law.”

<sup>87</sup>466 U.S. 668, 690-91.

<sup>88</sup>*Wiggins*, 123 S. Ct. at 2536.

<sup>89</sup>*Id.*

The majority also observed that “[t]he ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover *all* reasonably available mitigating evidence,’”<sup>90</sup> adding that based on both the ABA Guidelines and the ABA Standards for Criminal Justice, this investigation should delve into various topics, including the defendant’s “family and social history.”<sup>91</sup> Justice O’Connor referred to these standards as “well defined norms,”<sup>92</sup> thus implying that, in the absence of a reasonable justification for the defense attorney’s failure to conduct an investigation for reasonably available mitigating evidence, the attorney’s failure to conduct such an investigation would constitute deficient performance under *Strickland*.

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<sup>90</sup>*Id.* at 2537 (emphasis in original).

<sup>91</sup>*Id.*

<sup>92</sup>*Id.*



Justice O'Connor further concluded that Wiggins' attorneys' decision to curtail investigation could not be justified as a reasonable strategic decision; rather, the attorneys decision to abandon their investigation when they did "made a fully informed sentencing strategy impossible."<sup>93</sup>

**B. Three Unresolved Issues**

Although *Wiggins* was simply applying *Strickland*'s ineffective assistance of counsel test, the Court's analysis indicated that its view of the standard of care required by an attorney representing a capital defendant may have evolved since *Strickland* was decided in 1984.<sup>94</sup> Although in *Strickland* the Court indicated that professional standards such as those articulated in the ABA Guidelines would not necessarily define the standard of care for criminal defense attorneys,<sup>95</sup> the *Wiggins* majority indicated that at least the ABA Guidelines relating to a capital defendant's attorney's obligation to investigate for "all reasonably available mitigating evidence" does articulate the standard of care for a defense attorney representing a capital defendant. The defense attorney may not trump this obligation, moreover, by simply asserting that she adopted a strategy that focused exclusively on reasserting the defendant's possible innocence at the penalty trial.

In assessing *Wiggins*' application to other situations in which a capital defense attorney curtails investigation because she opts for a strategy of reasserting a claim of innocence at the penalty trial, three questions seem especially significant: First, in

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<sup>93</sup>*Id.* at 2538.

<sup>94</sup>For the argument that the standard of care required by a capital defendant's attorney would evolve as the Court became more familiar with the practices of experienced capital defense attorneys, see White, *Effective Assistance*, *supra* note 49.

<sup>95</sup>*Strickland*, 466 U.S. at 688-89.

defining counsel's duty to investigate for mitigating evidence, what does the Court mean by "all reasonably available mitigating evidence?" Second, can a capital defense attorney justify a decision to curtail investigation for mitigating evidence because of the defendant's request that no such evidence be presented at the penalty trial? And, third, when may the attorney make a reasonable decision to curtail investigation (or not to present mitigating evidence) on the basis of a strategic choice that relates to the quality of the available mitigating evidence?

**1. The Duty to Investigate for "All Reasonably Available Mitigating Evidence"**

As explained by the Court, *Wiggins* provides a clear example of a case in which the mitigating evidence counsel failed to investigate was "reasonably available." At the time of *Wiggins*' trial, "the Public Defender's Office made funds available for the retention of a forensic social worker"<sup>96</sup> who would prepare a report relating to the defendant's background. Using funds to obtain such a report would not affect the extent to which counsel would have resources available for obtaining investigators or expert witnesses who would strengthen the defendant's defense at the guilt trial, moreover, because the guilt trial had already been completed. In *Wiggins*, the mitigating evidence was thus "reasonably available" not only because counsel could obtain it but also because it could be obtained without any strain on existing resources.

In other cases, the availability of potential mitigating evidence will not be so clear. In many jurisdictions, judges have discretion as to the amount of funds to be

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<sup>96</sup>*Wiggins*, 123 S. Ct. at 2536.

allocated to capital defense attorneys for investigation.<sup>97</sup> In exercising this discretion, judges may limit the maximum number of expert witnesses or inform the attorney that the total amount of funds for investigation cannot exceed a certain amount.<sup>98</sup> In cases where

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<sup>97</sup>In most states, statutes provide judges with wide discretion as to the expenses to be allocated for the investigation and preparation of a capital case, *see, e.g.*, TEX. CODE CRIM. PROC. ART. 26.052(f)-(g) (2003) (counsel may request and court shall grant reasonable “advance payment of expenses to investigate potential defenses”); TENN. CODE ANN. § 40-14-207(b) (2002) (court may grant prior authorization for “investigative or expert services or other similar services” necessary to protect defendant’s constitutional rights “in a reasonable amount to be determined by the court”); CAL. PENAL CODE ANN. § 987.9(a) (2003) (counsel may request fund for payment of “investigators, experts, and others for the preparing or presentation of the defense” and “a judge . . . shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant’s attorney”). *See generally* Stephen Bright, *Neither Equal Nor Just: The Rationing and Denial of Equal Services To The Poor When Life And Liberty Are At Stake*, 1997 ANN. SURV. AM. L. 783, 820 (judges routinely use their discretion to deny defense counsel the funds needed to adequately investigate a case and often do so by requiring counsel to show the need for such funds—“a showing that frequently cannot be made without the very . . . assistance that is sought.”).

<sup>98</sup>*See, e.g.*, *State v. Daniel*, 2001 Tenn. Crim. App. LEXIS 967 at 30-34 (Trial court did not abuse discretion in refusing to appoint a mitigation specialist because defendant failed to make the required showing that (1) D would be deprived of a fair trial without such assistance and (2) there was a reasonable likelihood that such assistance would materially assist the defense); *United States v. Hurn*, 52 M.J. 629, 633 (1999) (Trial court did not abuse discretion in refusing to appoint a mitigation specialist when the court had already appointed a psychologist); *Commonwealth v. Shabazz*, 2003 Va. Cir. LEXIS 74 (2003) (Trial court properly limited mitigation specialist to 20 hours to establish factual basis for full investigation for mitigating evidence). *But see Williams v. State*, 669 N.E.2d 1372, 1384 (Ind. 1996) (Finds abuse of discretion in trial court’s decision to limit mitigation specialist to 25 hours of investigation, but establishes no clear standards for determining when a judge’s failure to authorize defense investigation will constitute an abuse of discretion).

The judge’s authority to exercise discretion under these statutes is limited, however, by *Ake v. Oklahoma*<sup>470</sup> U.S. 68 (1975), which holds that, upon a sufficient showing that his mental condition will be a significant factor in a capital case, a capital defendant is entitled to compensation for a psychiatrist to assist the defense. Lower courts have interpreted *Ake* as requiring compensation of other defense experts upon an adequate showing that they are needed to assist the defense in developing a significant issue. *See White, Effective Assistance, supra* note 49, at 342. Under *Ake*, a judge should not be permitted to limit the number of expert witnesses or to limit the compensation for experts if the defense makes a sufficient showing that an expert is needed to develop a

a capital defendant has a strong claim of innocence, his attorney may believe—rightly or wrongly—that she should opt for presenting the strongest defense at the guilt stage rather than diminishing the resources available for that purpose by requesting funds to investigate for mitigating evidence.<sup>99</sup> In this situation, the attorney may opt either to not investigate for mitigating evidence at all or to curtail the investigation for mitigating evidence so as not to diminish the resources available for strengthening the defendant’s defense at the guilt stage.

In applying *Wiggins* to these situations, courts will have to decide whether counsel’s obligation to investigate for “all reasonably available mitigating evidence” encompasses an obligation to seek to obtain all such evidence that is actually available or only an obligation to seek “mitigating evidence” that can be obtained without placing a strain on the resources available for other purposes.

## **2. The Defendant Instructs the Attorney Not to Look for Mitigating Evidence**

In *Wiggins*, there was no indication that the defendant had given his attorneys any instructions relating to investigating or introducing mitigating evidence. In cases where a capital defendant has a strong claim of innocence, however, it is not unusual for the defendant to instruct the attorney that she is neither to investigate for mitigating evidence

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particular type of mitigation evidence. In practice, however, prior to *Wiggins* “many defense attorneys [did] not do a good job of making a showing of the need for funds.” Email from Stephen Bright to Author dated 8/31/03 (on file with author) [hereinafter Bright Email]. For further discussion of *Ake*, see note 248, *infra* and accompanying text.

<sup>99</sup>In some cases, the defense attorney’s belief that she must choose between allocating resources to the guilt or penalty stage may be mistaken. If the attorney can make a sufficient showing under *Ake*, arguably she should be entitled to compensation for expert witnesses at the penalty trial regardless of the funds already expended for expert witnesses at the guilt trial. See note 98, *supra*.

nor to present it at the penalty trial in the event the defendant is convicted at the guilt trial. In addition, at some point during the pretrial preparation, the defendant may instruct the attorney either to stop investigating for mitigating evidence entirely or to curtail some particular aspect of the investigation, such as interviewing the defendant's family members. *Wiggins'* holding raises the question whether the defense attorney's duty to investigate for available mitigating evidence applies to cases in which the attorney receives these kinds of instructions.

Although lower courts have addressed various situations in which a capital defendant instructed a defendant to curtail investigation for mitigating evidence,<sup>100</sup> *Wiggins* did not involve a situation in which any such instructions were given. *Wiggins'* application to cases involving these kinds of instructions is thus unclear.

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<sup>100</sup>See *infra* notes 254-61 and accompanying text.

### 3. Strategic Choices to Ignore Potential Mitigating Evidence

At *Wiggins*' post conviction hearing, *Wiggins*' senior attorney explained the attorneys' decision to curtail investigation, testifying that they decided not to introduce mitigating evidence relating to the defendant's background because they didn't want to dilute his claim of innocence.<sup>101</sup>

In *Strickland* and at least two later cases,<sup>102</sup> the Court had held that, under the circumstances presented in those cases, a capital defendant's attorney's decision to curtail investigation for mitigating evidence was a reasonable strategic decision and, therefore, did not constitute deficient performance. In *Wiggins*, on the other hand, the Court held that, assuming *Wiggins*' attorneys made the strategic decision not to investigate for mitigating evidence because they wanted to focus primarily on reasserting the defendant's innocence at the penalty trial, the decision was unreasonable. Based on *Wiggins*, when will an attorney's strategic decision to curtail investigation because of a choice to emphasize evidence related to innocence be unreasonable?

Characterizing *Wiggins*' attorneys' decision to curtail investigation as a strategic decision is questionable. As the Court indicated,<sup>103</sup> if the attorneys' bifurcation motion filed prior to the penalty trial had been granted, the attorneys would not have had to worry about the possibility of diluting the evidence of *Wiggins*' innocence which was presented at the penalty trial. The attorneys would have been able to introduce that evidence during the first phase of the bifurcated proceeding and, if that strategy was

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<sup>101</sup>*Wiggins*, 123 S. Ct. at 2533.

<sup>102</sup>See *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986).

<sup>103</sup>*Wiggins*, 123 S. Ct. at 2532.

unsuccessful, introduce mitigating evidence relating to the defendant's background at the second phase.<sup>104</sup> As the Court stated,<sup>105</sup> there was thus reason to believe that the attorneys' decision was based on "inattention" rather than strategy.<sup>106</sup> If the Court wanted to limit its holding in *Wiggins*, it could distinguish *Wiggins* from other situations in which a capital defense attorney curtails investigation for mitigating evidence on the ground that in *Wiggins*' the attorneys' decision to curtail investigation was not really a strategic choice.

The majority stated, however, that "assuming [*Wiggins*' attorneys] limited the scope of their investigation for strategic reasons,"<sup>107</sup> their decision was unreasonable. To justify this conclusion, Justice O'Connor explained that the attorneys' decision to abandon their investigation when they did "made a fully informed sentencing strategy impossible."<sup>108</sup>

But why would it be unreasonable for the attorneys to decide that they would curtail the investigation into *Wiggins*' background because they wanted to focus exclusively on relitigating his guilt? The attorneys' reasoning might be as follows: (1) the evidence of the defendant's innocence was so strong that it was likely to have a

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<sup>104</sup>*Id.* at 2537-38.

<sup>105</sup>*Id.* at 2542.

<sup>106</sup>At the opening of the sentencing hearing, defense counsel "entreated the jury to consider not just what *Wiggins* is found to have done, but also 'who [he] is.'" 123 S. Ct. at 2538. She then informed the jury that it "would hear that Kevin *Wiggins* has had a difficult life." *Id.* Despite these comments, however, counsel never presented any evidence relating to "*Wiggins*' history." *Id.*

<sup>107</sup>*Id.*

<sup>108</sup>*Id.* at 2542.

powerful effect on the sentencing jury; (2) Presenting mitigating evidence relating to the defendant's background might dilute the strength of that evidence, making it less likely that the jury would spare the defendant because of their lingering doubt as to his guilt; (3) therefore, investigating for mitigating evidence relating to the defendant's background was unnecessary because no such evidence would be introduced at the penalty trial.

The majority's analysis indicated that this type of reasoning is untenable. Justice O'Connor concluded that competent performance in the *Wiggins* case required a fuller investigation because in view of "the strength of the available evidence," a reasonable attorney might well have chosen to "prioritize the mitigation case over the responsibility challenge," or at least to adopt both "sentencing strategies" since they were "not necessarily mutually exclusive."<sup>109</sup> In other words, regardless of the attorneys' assessment of the strength of the evidence showing *Wiggins*' innocence, the attorneys could not automatically opt for a strategy that focused solely on presenting this evidence. The Court's analysis thus seemed to indicate that, at least in the absence of an adequate investigation, a capital defense attorney's decision to rely solely on relitigating the defendant's guilt at the penalty trial is unreasonable.

The majority was less clear, however, in delineating the circumstances under which a capital defendant's attorney can make the strategic decision to curtail investigation because her preliminary investigation convinces her that a full investigation for mitigating evidence would be unproductive. In *Wiggins*, the preliminary investigation indicated that the potential mitigating evidence related to the defendant's troubled

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<sup>109</sup>*Id.*



childhood and severe mental problems.<sup>110</sup> Wiggins' holding thus appears to indicate that, in the absence of a full investigation, an attorney's strategic decision to reject the possibility of introducing this type of mitigating evidence would be unreasonable. The Court's analysis did not suggest, however, that an attorney could never reasonably make a strategic choice to curtail investigation because she concluded that seeking additional mitigating evidence would be unproductive. On the contrary, the Court intimated that an attorney would be able to justify such a choice in cases where the attorney could reasonably conclude that she would not want to introduce potential mitigating evidence because of a concern that it would be unproductive or double-edged.<sup>111</sup>

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<sup>110</sup>*Id.* at 2536.

<sup>111</sup>The Court cited with apparent approval earlier cases in which it had held that a capital defendant's attorney's decision to curtail investigation was reasonable because the attorney reasonably concluded that the evidence likely to be disclosed by further investigation would be double-edged or unproductive. See 123 S. Ct. at 2537 (citing *Strickland v. Washington*, 466 U.S. 668 (1984); *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986)).

Based on *Wiggins*' holding and analysis, the circumstances under which a capital defendant's attorney strategic choice to curtail an investigation for mitigating evidence will constitute deficient performance is thus also unclear.

### **III. Preparing for the Penalty Trial**

#### **A. The Division of Responsibility Between Lawyer and Client**

In representing a criminal defendant, a defense attorney must ordinarily be guided by her client with respect to the nature of the defenses presented.<sup>112</sup> If the defendant tells his attorney to present a defense at the guilt stage, the attorney will generally be required to present that defense, even though she is convinced that it is very weak.<sup>113</sup> Similarly, if a competent capital defendant insists that the attorney present no evidence at the penalty stage in the event he is convicted of the capital offense, the attorney must adhere to her client's wishes.<sup>114</sup> In practice, however, while the defendant makes the final decision, the defendant's attorney will often be able to exert influence that will significantly affect that decision. David Bruck, a South Carolina defense attorney who has participated in hundreds of capital cases, states that one of any criminal defense attorney's most important roles is to "make an assessment of the strength of the defendant's various possible defenses and to advise the defendant as to which of those defenses should be presented to the jury and how they should be presented."<sup>115</sup> When the defendant initially asserts an implausible claim of innocence, for example, an experienced defense attorney will generally be able to dissuade the defendant from asserting that claim at trial.

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<sup>112</sup>With respect to a lawyer's responsibilities, most states now follow the ABA Model Rules of Professional Conduct. Rule 1.2(a) provides that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." For statutes codifying this rule, *see, e.g.*, 21 N.C.A.C. § 2.1.2(a) (2003); 204 PA. CODE Part V, Subpt. A, Ch. 81, Subch. A, Rule 1.2 (2003). The ABA Model Code of Professional Responsibility,

When a capital defendant with a strong claim of innocence directs his attorney not to seek or to introduce evidence at the possible penalty trial, however, the psychological dynamics involved are likely to be more complex. In this situation, the defendant's position probably emanates from his belief that he should not be convicted of the capital offense. He thus believes that his attorney's focus should be exclusively on presenting the strongest possible defense at the guilt trial. Preparing for the penalty trial will be a waste of time because the penalty trial will never take place; expending time and resources in preparing for this non-event will be counter-productive, moreover, because it will deflect the attorney from focusing on the guilt trial. And, finally, if the defendant is forced to contemplate the possibility of a conviction at the guilt stage, he may be inclined

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which was replaced by the ABA Model Rules in most states but is still followed in a few states, also requires that attorneys pursue their clients' desired course of action. See American Bar Association, ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, Canon 7, EC 7-5 (1983).

<sup>113</sup>However, an attorney cannot assist her client in "conduct that [she] knows is . . . fraudulent." AMERICAN BAR ASSOCIATION, ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.2(d) (2002). The ABA defines "fraudulent" as "conduct that . . . has a purpose to deceive." *Id.* at Rule 1.0. Thus, an attorney cannot follow a client's directive to present a defense that he or she knows to be false. For states codifying this rule, *see, e.g.*, 204 Pa. Code Part V, Subpt. A, Ch. 81, Subch. A, Rule 1.2(d) (2003); 27 N.C.A.C. § 2.1.02(d) (2003).

<sup>114</sup>For example, in *Zagorski v. Tennessee*, the defendant told his attorney before trial that "if convicted, he preferred death instead of a possible life sentence." *Zagorski v. Tennessee*, 983 S.W.2d 654, 656 (Tenn. 1998). He then instructed counsel neither to investigate nor present mitigating evidence. *Id.* The defendant remained firm in his decision, even after his attorney informed him "about the importance of and the need to investigate" for mitigating evidence. *Id.* The attorney then followed the defendant's instructions. *Id.* at 655. The Supreme Court of Tennessee held that counsel acted reasonably. The court stated that "when a competent and fully informed defendant instructs counsel not to investigate or present mitigating evidence at trial, counsel will not later be adjudged ineffective for following those instructions." *Id.* at 657.

<sup>115</sup>Telephone Interview with David Bruck, Federal Death Penalty Resource Attorney for South Carolina, (4/6/03) [hereinafter Bruck Interview].

to believe that, if the jury confounds his expectations at the guilt trial, he doesn't care what happens at the penalty trial. In fact, it is not uncommon for defendants with strong claims of innocence to say to their attorneys, "I don't want you to present any evidence at the penalty trial. If the jury convicts me, I'd rather die than be sent to prison."

**B. The Difference Between Experienced and Inexperienced Capital Defense Attorneys**

A capital defense attorney's approach to the issues presented in this scenario is likely to vary depending on the extent of her experience with capital cases. Criminal attorneys lacking experience in capital cases will be less likely to question their clients' desire to disregard the penalty trial because these attorneys will be naturally inclined towards focusing their energies almost exclusively on the guilt trial. Stephen Bright, the Director of the Southern Center for Human Rights, who specializes in capital cases, explains that these defense attorneys, who are usually skilled and experienced at raising issues of reasonable doubt in ordinary criminal cases, are unfamiliar with the capital defense attorney's role of pleading for the defendant's life at the penalty stage of a capital case. In fact, these lawyers may perceive that Bright's view of the lawyer's role at the penalty trial—finding the social and biographical evidence relating to the defendant's life and then presenting it to the jury in a way that will "humanize" the defendant so that the jury has a fuller understanding of who the defendant is, where he has come from, and why he is the way he is<sup>116</sup>—is "a job that should be done by a social worker rather than a

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<sup>116</sup>Attorneys with experience in capital cases have long recognized the importance of introducing mitigating evidence that will humanize the capital defendant, thereby leading the penalty jury to empathize with the defendant. *See, e.g.,* White, *Effective Assistance*, *supra* note 49, at 361; Goodpaster, *supra* note 49, at 321-24, 335-37. For an account of a recent capital case in which a capital defendant's attorney was able to obtain a life sentence for his client by presenting evidence at the penalty trial that traced the

lawyer.”<sup>117</sup> When a lawyer with this perspective has a client who requests that she focus primarily or exclusively on the guilt trial, lawyers lacking experience in capital cases will be inclined to minimize the extent to which they prepare for the penalty trial, using the client’s instructions to justify a choice they might make in any event.<sup>118</sup>

In addition, criminal defense lawyers lacking experience in capital cases may dismiss the importance of preparing for the penalty trial because they share their client’s view that he will be acquitted of the capital offense. Michael Burt, a federal death penalty resource counselor who frequently advises attorneys representing capital defendants,<sup>119</sup> says that lawyers with experience in ordinary criminal cases but not in capital cases, often “grossly underestimate the difficulty in convincing a death-qualified jury that there is a reasonable doubt as to the defendant’s guilt.”<sup>120</sup> Burt states that “death-qualified juries do not evaluate evidence in the same way as other juries and are thus much more likely than other juries to credit the prosecution’s evidence and less likely to acquit the defendant or to find him guilty of a lesser [i.e. non-capital]

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defendant’s troubled history, thereby obtaining the penalty jury’s empathy, see Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES, July 6, 2003, N.Y. TIMES MAG. 32.

<sup>117</sup>Telephone Interview with Stephen Bright (3/6/03) [hereinafter Bright Interview].

<sup>118</sup>Bright Email, *supra* note 98. Bright points out that, even if the client doesn’t give the lawyer any instructions, lawyers lacking experience in capital cases will tend to focus disproportionately on the guilt trial and not enough on the penalty trial because they are “more comfortable with the guilt phase.” *Id.*

<sup>119</sup>From 1989-2002, Burt was head trial attorney in the San Francisco Public Defender’s Office. Telephone Interview with Michael Burt (3/17/03) [hereinafter Burt Interview].

<sup>120</sup>Burt Interview, *supra* note 119.

offense.”<sup>121</sup> Others with wide experience in capital cases not only share Burt’s view but state that death-qualified juries’ conviction proneness (i.e. its tendency to convict more readily than a non-death-qualified jury) has increased in recent years.<sup>122</sup> Experienced practitioners have a sense that in recent years “increasing doubts about the death penalty” have led to the exclusion of more fair-minded people from death-qualified juries.<sup>123</sup> As a result, capital defendants are “losing more good jurors than ever.”<sup>124</sup>

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<sup>121</sup>*Id.*

<sup>122</sup>Michael Charlton, for example, stated that with respect to determining issues related to guilt or innocence “the difference between ordinary juries and death-qualified juries is far greater than most people realize.” Telephone Interview with Michael Charlton (3/10/03) [hereinafter Charlton Interview]. For data relating to the differences between death-qualified and non-death qualified juries, *see, e.g.*, Lockhart v. McCree, 476 U.S. 162 (1986). *See generally* Mike Allen et al., *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 LAW & HUM. BEHAV. 715 (1998) (analysis of studies relating to death-qualifying the jury indicate, death qualification produces juries that in comparison to the normal population have “a 44% increased probability of voting for conviction”).

<sup>123</sup>In most jurisdictions, the rule allowing the government to have a death-qualified jury took root during the 19th century. In order to obtain jurors that would not refuse to convict or to sentence a capital defendant to death because of their opposition to capital punishment, the prosecutor was permitted to exclude veniremen whose scruples about capital punishment might render them incapable of voting for a conviction or a death sentence in a capital case. *See* Stanton D. Krauss, *The Witherspoon Doctrine at Witt’s End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1, 3-4 (1986). In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Court limited the prosecutor’s right to exclude such veniremen to cases in which the veniremen made it unmistakably clear that their views against capital punishment would lead them to automatically vote against the death penalty or to decline to impose a verdict that could result in a death sentence. In *Wainwright v. Witt*, 469 U.S. 412 (1985), however, the Court sharply limited *Witherspoon*, holding that a prosecutor may exclude a veniremen when there is sufficient evidence that her views on capital punishment would “prevent or substantially impair the performance of his duties as a juror” with respect to applying the law relating to the circumstances under which the defendant should be convicted of a capital crime or sentenced to death. 469 U.S. at 424. For a detailed analysis of *Witherspoon* and *Witt*, *see* Krauss, *supra*.

<sup>124</sup>Interview with Russell Stetler (6/5/03) [hereinafter Stetler Interview].

Defense attorneys who are unaware of this difference may mistakenly believe that their ability to convince the jury of a reasonable doubt as to the defendant's guilt will obviate the necessity for a penalty trial. Indeed, Burt states that it is not unusual for attorneys who lack experience in such cases to "talk themselves into thinking they don't have to worry about the penalty phase because they have a great shot of winning the case."<sup>125</sup> Burt adds that some lawyers soliciting his advice have asked him to "validate their decision" not to seek mitigating evidence in preparation for the penalty phase of a capital trial because their clients, who are presenting claims of innocence at the guilt trial, do not want them to present such evidence.<sup>126</sup> Indeed, even some attorneys who have had experience in capital cases can remember capital cases in which they did no preparation for the penalty trial because they believed that a strong claim of innocence would prevail at the guilt trial.<sup>127</sup>

Burt and other attorneys who specialize in capital cases unequivocally reject this approach. Because they are aware that even a defendant with a strong claim of innocence may be found guilty of a capital offense, these attorneys state that a lawyer representing a capital defendant should always prepare for the penalty trial. At a minimum, the lawyer

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<sup>125</sup>Burt Interview, *supra* note 119. For a fuller explanation of Burt's view on this point, see Michael N. Burt, *Overview: Effective Capital Representation in the Twenty First Century*, 1 CALIFORNIA DEATH PENALTY DEFENSE MANUAL 7 (1998 ed.).

<sup>126</sup>Burt Interview, *supra* note 119.

<sup>127</sup>Michael Charlton remembered at least one case in which he and the other defense attorneys representing a Texas capital defendant decided to do no preparation for the penalty stage of the case because they were confident that the defendant would be acquitted. Even though that defendant was in fact acquitted, Charlton said that his present policy is to prepare for the penalty trial whenever he represents a capital defendant. In addition, he stated that he would make every attempt to pursue this policy even if his client stated that he did not want to have mitigating evidence presented at the penalty trial. Charlton Interview, *supra* note 122.

should prepare a social history of the client.<sup>128</sup> This history, which can generally best be assembled by an expert who has a background in psychology or social work, will trace the defendant's life from the time he was born (or in some cases even before he was born) to the present.<sup>129</sup> The history should be based on a wealth of data: information provided by the defendant's family members and people who have known him during the various stages of his life, the defendant's school and other institutional records, reports from mental health professionals or other experts who have examined the defendant, and other relevant data.<sup>130</sup> One of the purposes of the social history is to provide defense counsel with potential mitigating evidence to be presented at the penalty trial.

A capital defendant who objects to the idea of introducing mitigating evidence at the penalty trial is, of course, likely also to object to the idea of preparing a social history that includes potential mitigating evidence. Experienced capital defense attorneys say that there are at least two ways to deal with such objections:<sup>131</sup> If the defendant would agree that a death sentence is a worse alternative than a life sentence, the attorney can emphasize to the client that it is "always necessary to prepare for the worst."<sup>132</sup> The attorney might tell her client that, even though she is hopeful that the defendant's trial defense will be successful, she wants to be prepared for every contingency. Therefore, it

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<sup>128</sup>Burt Interview, *supra* note 119; Bright Interview, *supra* note 117.

<sup>129</sup>For examples of social histories compiled by mitigation experts, see White, *Effective Assistance*, *supra* note 49, at 325-29. In order to compile an adequate social history, the mitigation expert will often need the assistance of other court-appointed experts. *See id.* at 342-44.

<sup>130</sup>See White, *Effective Assistance*, *supra* note 49, at 341-42.

<sup>131</sup>Burt Interview, *supra* note 119; Bright Interview, *supra* note 117.

<sup>132</sup>Burt Interview, *supra* note 119.



is essential that the attorney be prepared to present persuasive mitigating evidence at the penalty trial in the event the defendant is found guilty of the capital offense.

In addition, the defense attorney can truthfully tell her client that investigating the defendant's background may lead to evidence that will assist the defense at the guilt stage.<sup>133</sup> Witnesses who are familiar with the defendant may be able to testify to his good character, thereby convincing the jury that the defendant is simply not the kind of a person who could have committed the crime.<sup>134</sup> Or if the government is introducing the defendant's incriminating statements to establish his guilt, evidence relating to the defendant's mental problems may be used to cast doubt on his statements' reliability.<sup>135</sup>

When dealing with a capital defendant who persists in objecting to the introduction of mitigating evidence at the penalty trial, experienced capital defense attorneys will sometimes exert considerable pressure on the defendant to change his mind. Richard Jaffe, an Alabama defense attorney who has represented dozens of capital defendants, provides an example. Jaffe was appointed to represent Gary Drinkard at his retrial for a capital offense. At his first trial, Drinkard, who consistently maintained his

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<sup>133</sup>Burt Interview, *supra* note 119; telephone interview with Gary Taylor, an attorney in Austin, Texas, who specializes in representing capital defendants, (3/25/03) [hereinafter Taylor Interview].

<sup>134</sup>A defendant in a criminal case is allowed to have witnesses testify to his good character for the purpose of showing that, in view of his character traits, he was less likely to have committed the crime charged. Character witnesses often testify to the defendant's peaceful reputation, for example, for the purpose of showing the defendant was less likely to have attacked the victim. *See, e.g., Commonwealth v. Watkins*, 2003 Pa. Lexis 969 (2003).

<sup>135</sup>Interview with John Niland, Federal Death Penalty Resource Attorney for Texas (3/11/03) [hereinafter Niland Interview]. For an analysis of cases in which capital defendants with mental problems were convicted on the basis of police-induced false confessions, see Welsh S. White, *False Confessions in Capital Cases*, 2003 ILL. L. REV. 601 [hereinafter Niland Interview].

innocence, had been convicted of murder and sentenced to death. During the penalty trial in that case, Drinkard's attorney presented no mitigating evidence because Drinkard had instructed him not to.<sup>136</sup> After Drinkard's conviction and death sentence were reversed,<sup>137</sup> Jaffe and two other attorneys represented Drinkard at his second trial.<sup>138</sup>

While these attorneys were preparing for Drinkard's second trial, Drinkard indicated that, if he were again convicted of the capital offense, he still did not want to have any mitigating evidence presented at the penalty trial. He stated that he would rather be executed than spend the rest of his life in prison. When Jaffe was informed of this, he met with Drinkard for the first time. He told Drinkard that they had a great defense team and that he thought the investigation and preparation for trial was going very well. He then told Drinkard that he could not continue to be a part of the defense team if Drinkard persisted in his refusal to have mitigating evidence introduced at a possible penalty trial. When Drinkard asked why, Jaffe replied, "I don't defend people who want to die." Drinkard then changed his mind and signed an agreement which stated that he was willing to have his attorneys present mitigating evidence on his behalf in the event that there was a penalty trial. The agreement was ultimately irrelevant, however, because Drinkard was acquitted at his second trial.<sup>139</sup>

The pressure exerted by Jaffe on Drinkard may seem extreme. Stephen Bright observes, however, that capital defense attorneys will often have to be very forceful in

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<sup>136</sup>*Ex Parte* Gary Drinkard, 777 So. 2d 295, 297 (Ala. 2000).

<sup>137</sup>*Drinkard*, 777 So. 2d at 297. (Reversing conviction because evidence of prior bad acts was improperly admitted at trial.)

<sup>138</sup>Interview with Richard Jaffe (3/8/03) [hereinafter Jaffe Interview].

<sup>139</sup>Jaffe Interview, *supra* note 138.

dealing with defendants who do not want to have evidence presented at the penalty trial. Logic and other persuasive techniques that might be successful in other contexts are less likely to be successful with these defendants because the defendants may be incapable of either focusing on the penalty trial or understanding the impact that the failure to prepare for that trial may have on the jury's ultimate decision. In Bright's judgment, however, the "failure to prepare for the penalty trial" is not a viable option because introducing mitigating evidence that "will provide the jury with an in-depth understanding of the defendant" and the people connected to him is generally the only way that defense counsel can avoid a death sentence.<sup>140</sup> When there is a disagreement between the attorney and the client, it is thus imperative that the attorney use every permissible means to convince the defendant that the defense should present mitigating evidence at the penalty trial.

**C. The Attorney's Obligation to Investigate in Preparation for the Penalty Trial**

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<sup>140</sup>Bright Interview, *supra* note 117.

From the capital defense attorney's perspective, convincing the defendant that the defense needs to investigate for the purpose of presenting mitigating evidence at the penalty trial is important because it will facilitate the investigation.<sup>141</sup> Even if the defendant does not agree that the defense should introduce mitigating evidence at a possible penalty trial, however, the attorney should nevertheless insist that an investigator compile a complete social history of the defendant. From the attorney's perspective, the social history is indispensable for two reasons: first, as Michael Burt explained,<sup>142</sup> it may uncover evidence relevant to the guilt trial; second, the attorney needs the fruits of the investigation to provide the defendant with information that will enable him to make an informed choice with respect to his options at the penalty trial.

As I have indicated,<sup>143</sup> a capital defendant with a strong claim of innocence may be unable to focus on the penalty trial prior to the guilt trial. In order to ensure that the defendant makes an informed decision as to the strategy to be adopted at the penalty trial, the defense attorney will thus sometimes have to postpone the final discussion of this issue until the defendant has been convicted of the capital offense. In order to make the defendant fully aware of his options at that time, however, the attorney must be aware of

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<sup>141</sup>In addition to providing information relating to his own background, the defendant may be able to identify witnesses or significant aspects of his life that will be valuable to the investigator compiling the defendant's social history.

<sup>142</sup>See *supra* note 133 and accompanying text.

<sup>143</sup>See *supra* note 115-16 and accompanying text.

the nature of any potential mitigating evidence so that she will be able to explain to the defendant the value of introducing that evidence at the penalty trial.<sup>144</sup>

When a capital defendant has no objection to presenting mitigating evidence at the penalty trial, the defense attorney's obligation to investigate for the purpose of presenting evidence at the penalty trial will generally be clear. As the Court observed in *Wiggins*, the ABA Guidelines have long provided that a capital defense counsel's investigation should "comprise efforts to discover all reasonably available mitigating evidence."<sup>145</sup> Neither the ABA Guidelines nor any other source suggests that a capital defense attorney's obligation to investigate for mitigating evidence varies depending on the strength of the capital defendant's defense at the guilt trial.

Is there any basis for concluding that an attorney's obligation to investigate should vary depending on this factor? Since every lawyer knows that defenses that appear rock solid before trial sometimes may be eviscerated at trial, a capital defense attorney surely cannot rely on the fact that the capital defendant's claim of innocence will be so strong as to negate the possibility of a penalty trial.

Some defense attorneys may believe, however, that in certain types of cases there is no need to investigate for mitigating evidence because, even if the defendant is convicted of the capital offense, the proper strategy at the penalty trial will be to rely entirely on persuading the jury that they should not sentence the defendant to death because of their lingering doubt as to his guilt. When the government's case is based on

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<sup>144</sup>For a discussion of lower court cases addressing a capital defendant's attorney's obligation to inform her client of the value of introducing mitigating evidence at the penalty trial, see at notes 254-61, *infra* and accompanying text.

<sup>145</sup>*Wiggins v. Smith*, 123 S. Ct. 2527, 2537 (2003).

weak circumstantial evidence, for example, the defense attorney may assert: first, if the defendant is convicted, a lingering doubt argument should be made to the penalty jury; and, second, since a jury's lingering doubt as to the defendant's guilt is the factor that is most likely to lead the jury to spare the defendant's life,<sup>146</sup> the attorney should not dilute the force of the lingering doubt argument by introducing mitigating evidence relating to the defendant's background. In order to assess this claim's validity, it is necessary to consider under what circumstances the strategy of relying solely on a claim of lingering doubt at the penalty trial is reasonable, a question that will be addressed in Part IV.

#### **IV. Defense Counsel's Strategy at the Penalty Trial**

##### **A. The Effect of the Defendant's Claim of Innocence at the Guilt Trial**

When a capital defendant who presented a claim of innocence at the guilt trial is convicted of the capital offense, the defendant's attorney will often need to confront the question of whether she should continue to assert the defendant's claim of innocence at the penalty trial. Even though the jury rejected this claim at the guilt stage, the attorney may believe that she should continue to assert this claim, arguing that jurors should vote to spare the defendant's life if they have any residual or lingering doubt as to the defendant's guilt. If the attorney does decide to argue that the jury should spare the defendant's life because of their lingering doubt as to his guilt, she may have to make other difficult decisions, including how she should present the lingering doubt claim and what other evidence and arguments will be compatible with that claim.

When the defense attorney believes that the claim of innocence presented at the guilt trial was strong, she may firmly believe that she should continue to press this claim

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<sup>146</sup>See *supra* note 48 and accompanying text.

at the penalty trial. When the jury in a capital case does have a lingering doubt as to the defendant's guilt, it seems clear that it will view such a doubt as one of the strongest possible reasons for sparing the defendant's life.<sup>147</sup> If the defense attorney has asserted a claim of innocence that seemed strong to her, she may naturally believe that at least one of the jurors will be sufficiently persuaded by that evidence to have a lingering doubt as to the defendant's guilt; and, in some jurisdictions, even one such juror may be enough to avoid a possible death sentence.<sup>148</sup> In capital cases where a strong claim of innocence was presented at the guilt trial, some defense attorneys will thus believe that the best penalty trial strategy is to argue that the jury should not impose the death penalty because of their lingering doubt as to the defendant's guilt. In some of these cases, moreover, these attorneys apparently believe that the argument relating to lingering doubt is the only argument that needs to be presented at the penalty trial. Instead of also presenting other mitigating evidence that might give the jury additional reasons for sparing the defendant's life, they rely solely on the argument that the jury's lingering doubt as to the defendant's guilt should lead it to impose a life sentence.<sup>149</sup>

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<sup>147</sup>*Id.*

<sup>148</sup>Under some sentencing statutes, the jury must unanimously agree to impose the death sentence in order to have a death sentence imposed. *See, e.g.*, 42 PA. CONS. STAT. § 9711(c)(iv)-(v) (2002) (a capital jury must unanimously decide to impose a death sentence, otherwise the judge will end the jury's deliberations and sentence the defendant to life imprisonment); 18 U.S.C. § 3593(d) (2003) (the jury must unanimously find aggravating factors and if they cannot do so unanimously, the court "shall impose a sentence other than death . . ."); 21 OKLA. STAT. § 701.11 (2002) (requiring a "unanimous recommendation of death" and if the jury cannot agree to a sentence, the sentence must be "imprisonment for life without parole or imprisonment for life").

<sup>149</sup>*See, e.g.*, *Parker v. Sec'y for the Dep't of Corrs.*, 2003 U.S. App. LEXIS 9771 (11th Cir. 2003) (following defendant's conviction, trial counsel decided to argue residual doubt and not to present much mitigating evidence because of concern that the mitigating evidence would do more harm than good); *Chandler v. United States*, 218 F.3d

Experienced capital defense attorneys, however, uniformly reject a strategy that places undue emphasis on convincing the jury that has just convicted a defendant that there is a lingering doubt as to that defendant's guilt. As I have already indicated,<sup>150</sup> jurors on a death-qualified jury are likely to evaluate evidence in a way that is strongly favorable to the prosecution. These jurors are thus significantly less likely than the normal population to perceive a lingering doubt, or any kind of doubt, as to a criminal defendant's guilt. In addition, members of any jury may believe that, once the jury has returned a guilty verdict, that verdict resolves *all* possible doubts against the defendant.<sup>151</sup> Indeed, they may feel that a defense attorney's argument that there is still a lingering doubt as to guilt is disrespectful to the jury in the sense that it challenges the legitimacy of their recently returned verdict.<sup>152</sup>

Empirical data indicate, moreover, that one of the factors that is most likely to lead jurors to spare a capital defendant's life is their perception that the defendant is remorseful.<sup>153</sup> When the defense has asserted that the defendant is innocent during the

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1305 (11th Cir. 2000) (trial counsel presented a strong claim of innocence at the guilt trial and primarily a residual doubt claim at the penalty trial); *Tarver v. Hopper*, 169 F.3d 710 (11th Cir. 1999) (same).

<sup>150</sup>See *supra* note 121-24 and accompanying text.

<sup>151</sup>See Sundby, *supra* note 48, at 1576-80 (after returning a guilty verdict, penalty jurors frequently fail to perceive a difference between reasonable and residual doubt; rather, they view their verdict as foreclosing any doubt as to the defendant's guilt).

<sup>152</sup>*Id.* at 1578 (some jurors feel insulted at the suggestion that they should have lingering doubts; these jurors fervently believe that they "would not have convicted the defendant in the first place had any such doubt existed.").

<sup>153</sup>*Id.* at 1566 (in interviews, jurors "frequently articulated . . . that they likely would have voted for a life sentence instead of death had the defendant expressed remorse."); John H. Blume, Theodore Eisenberg & Stephen P. Garvey, *Lessons from the*



guilt trial, the defendant cannot credibly express remorse for committing the crime at the penalty trial. If the defense argues lingering doubt at the penalty trial, however, the jury may view this argument as the strongest possible indication of the defendant's lack of remorse. If the defense insists that there is still a doubt as to whether the defendant committed the crime, then clearly the defendant not only lacks remorse for his crime, but is not even willing to take the first step towards accepting responsibility for committing it.<sup>154</sup>

Experienced capital defense attorneys thus conclude that even in cases where a strong claim of innocence has been presented at the guilt trial, the defense should sometimes make no reference to the possibility of lingering doubt at the penalty trial. Instead, the defense should ostensibly take the position that the guilt and penalty trials are completely separate proceedings. If one attorney represented the defendant at the guilt trial, a new attorney should generally represent him at the penalty trial. That attorney may begin by telling the jury that the defense accepts the jury's verdict. She will then explain that the case has now entered a new stage in which the jury will have to decide whether the defendant will be sentenced to death or life in prison and that, in deciding this question, they will need to "look at who the defendant is."<sup>155</sup> The attorney will then proceed to present mitigating evidence that will explain the defendant's background,

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*Capital Jury Project*, 144, 164-65 in *BEYOND REPAIR? AMERICA'S DEATH PENALTY* (Stephen P. Garvey ed., 2003) (same).

<sup>154</sup>*Id.* at 1574 (concludes based on interviews with jurors that "a defendant's degree of remorse is largely a reflection of whether the defendant is at least acknowledges the killing or whether he is refusing to accept any responsibility for the killing").

<sup>155</sup>Burt Interview, *supra* note 119.

including his childhood, his mental health, the difficulties he has encountered, his accomplishments, and other circumstances, including perhaps “the suffering the defendant’s family will go through if the defendant is sentenced to death.”<sup>156</sup> Although the attorney may hope that some jurors will refuse to vote for the death penalty because they have a lingering doubt as to the defendant’s guilt,<sup>157</sup> she will not refer to this possibility during the penalty trial but instead will focus entirely on presenting mitigating evidence that will provide the jury with a multi-layered picture of the defendant.

As in every capital case, defense attorneys who have presented a claim of innocence at the guilt trial will have to make choices as to the nature of the mitigating evidence to be presented at the penalty trial. In a typical case, the investigation of the defendant’s social history will yield a wide array of evidence, including evidence relating to the defendant’s troubled childhood and impaired mental health, for example, as well as evidence relating to his positive accomplishments. Some of this evidence could be presented at the penalty trial for the purpose of explaining why the defendant committed the crime: his mental problems reduced his ability to control his conduct, perhaps; or the abuse he was subjected to as a child made him more inclined to respond to stressful situations with violence.<sup>158</sup>

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<sup>156</sup>Bright Email, *supra* note 98.

<sup>157</sup>According to experienced capital defense attorneys, juries in capital cases sometimes decide that they will not impose the death sentence during the guilt trial. Jurors who have some doubt as to the defendant’s guilt may agree to vote for a guilty verdict only on the condition that the jury will not impose the death sentence. Bright Interview, *supra* note 117; Bruck Interview, *supra* note 115.

<sup>158</sup>*See* White, *Effective Assistance*, *supra* note 49, at 360-65.

In cases where the defense has presented a strong claim of innocence at the guilt stage, experienced capital defense attorneys state that they will be less likely to introduce mitigating evidence designed to explain why the defendant committed the crime. Their reasoning is that it is essential for the defense to maintain a consistent theory throughout the capital trial.<sup>159</sup> If the defense has maintained throughout the guilt trial that the defendant did not commit the offense, introducing evidence at the penalty trial that seems to explain why he committed it may lead the jury to view the defense attorney as disingenuous. If the defense's penalty trial evidence provides an explanation for why the defendant is likely to respond to a stressful situation with violence, for example, the jury may feel that defense counsel should have presented this evidence at the guilt stage rather than asserting a claim of innocence without providing information that would help the jury assess that claim.

When it is possible, the defense will thus try to present only mitigating evidence at the penalty trial that is consistent with the defendant's claim of innocence at the guilt trial. Such evidence, which attorneys refer to as "good guy" evidence, may include evidence relating to the defendant's good character, his good employment record, or as in the *Chandler* case, the help he has provided to others in various situations.<sup>160</sup> Even if strong evidence of this type is not available, the defense might at least be able to present

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<sup>159</sup>See Lyon, *supra* note 44, at 708.

<sup>160</sup>In some cases, capital defense attorneys will be able to introduce evidence relating to the defendant's positive contributions in prison. In one case, the capital defendant's mitigating evidence related to the fact that the defendant had defused a dangerous situation in prison, thereby probably saving another prisoner's life. Jaffe Interview, *supra* note 138.

testimony that the defendant is a non-aggressive individual who does not have a prior history of violent behavior.

If significant “good guy” evidence is introduced, it will dovetail with the claim of innocence asserted at the guilt trial. Through presenting this evidence, the defense attorney hopes to revive any doubts that members of the jury may have had as to the defendant’s guilt. In the course of explaining who the defendant is, the defense attorney hopes to reinforce the idea that the defendant is *not* the kind of person who would have committed this crime. Some experienced capital defense attorneys can recall cases in which, after they have presented strong “good guy” mitigating evidence, the penalty jury not only declined to impose the death penalty but asked if they could change the guilty verdict they rendered at the guilt stage.<sup>161</sup>

Unfortunately, in some cases in which the defendant has maintained his innocence during the guilt trial, “good guy” evidence that could buttress this claim at the penalty trial will be noticeably lacking. The only potential mitigating evidence will be witnesses who, may be able to provide a sympathetic portrait of the defendant but can do so only by testifying to his problems, which may include, for example, “severe mental impairment perhaps resulting from organic brain damage and a profoundly troubled childhood in which the defendant was subjected to horrendous abuse and profound neglect.”<sup>162</sup>

Evidence of this type is double edged in the sense that, while it does explain where the defendant has come from and how he got to be the way he is, it also has the potential for

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<sup>161</sup>Charlton Interview, *supra* note 122; Niland Interview, *supra* note 135.

<sup>162</sup>Charlton Interview, *supra* note 122. According to Stephen Bright, it is not at all unusual for a capital defendant to have this kind of background. Bright Interview, *supra* note 117.

not only eliminating any lingering doubts jurors might have had as to the defendant's guilt, but also strengthening their perception that sparing his life will enhance the danger to society, a consideration that empirical data indicates will weigh heavily in the penalty jury's decision.<sup>163</sup>

The choice of whether to present double-edged mitigating evidence or to present little or no mitigating evidence might seem to present a dilemma for a capital defense attorney. When confronted with this choice, however, experienced capital defense attorneys uniformly agree that the double-edged evidence must be presented. Stephen Bright states that in a capital case defense counsel should always present mitigating evidence that will explain the defendant's background and history to the jury, thereby enabling the jury to gain an understanding of the defendant as a person.<sup>164</sup> As another experienced attorney explains, "You have to put the jury in the defendant's neighborhood" so that they will be able to "understand where he's been" and "what it was like growing up in the way he did."<sup>165</sup>

If no mitigating evidence relating to the defendant's background is presented, the jury is likely to feel they "have no reason to spare the defendant's life."<sup>166</sup> On the other hand, even double-edged mitigating evidence can be used to present a powerful case for

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<sup>163</sup>Results from the Capital Jury Project show that jurors "who believed the defendant would be a future danger [were] more likely to vote for death . . . than [those] who believed otherwise." Blume, Eisenberg & Garvey, *supra* note 153, at 144, 165. Such jurors fear that "unless the defendant is executed he will be released from prison too soon." *Id.* at 176. Death, they believe, is "the only real way to guarantee the defendant's incapacitation." *Id.*

<sup>164</sup>Bright Interview, *supra* note 117.

<sup>165</sup>Charlton Interview, *supra* note 122.

<sup>166</sup>Bright Interview, *supra* note 117.

life because of the way in which it causes the jury to empathize with the defendant. According to John Niland, an experienced Texas capital defense attorney, if the evidence is effectively presented, the jury may end up empathizing with the defendant or at least feeling that they have some understanding of the difficulties he has experienced in which case they will not be inclined to impose the death penalty.<sup>167</sup> In all capital cases, experienced capital defense attorneys thus invariably opt to introduce double-edged mitigating evidence when introducing such evidence is the only means of explaining the defendant's life.<sup>168</sup>

### **B. Arguing Lingering Doubt at the Penalty Trial**

Even though arguing lingering doubt to the penalty jury is often risky, experienced capital defense attorneys believe that there are situations in which such arguments should be made. In deciding whether to argue lingering doubt, these attorneys will consider various factors, including the length of the jury's deliberations, the strength and nature of both the government's and the defendant's case, the nature of the defense's possible penalty trial evidence, and the law of the jurisdiction relating to whether

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<sup>167</sup>Niland Interview, *supra* note 135.

<sup>168</sup>Defense counsel may also be able to take measures that will neutralize the adverse effects of potentially double-edged mitigating evidence. When dealing with mitigating evidence that is double-edged because it suggests that the defendant is the kind of person who would be likely to have committed the crime—the defendant's violent or troubled background, for example—defense counsel can sometimes argue that this evidence provides an explanation for why the police might mistakenly suspect the defendant of the crime. Niland Interview, *supra* note 135. If the mitigating evidence is double-edged because it suggests that the defendant may pose a future danger to society, moreover, defense counsel may be able to neutralize this evidence by introducing evidence that shows the defendant will not pose any danger to society if he is incarcerated for life. Evidence relating to the defendant's prior good conduct in prisons or other institutions, for example, may show that the defendant is dangerous only when he is in an unstructured environment. If he is sentenced to life in prison, he will not be a threat to anyone.

evidence or argument relating to lingering doubt may be introduced. In most cases, these same factors will also play an important part in determining the content of the attorney's lingering doubt argument, the extent to which the attorney will introduce other mitigating evidence, and the ways in which the attorney will interweave the arguments relating to lingering doubt with those relating to the other evidence. In order to illustrate experienced capital defense attorney's strategies, I will provide examples of several lingering doubt arguments, and then a fuller description of two penalty trial arguments, which illustrate the context in which lingering doubt arguments are presented and the methods through which skilled capital defense attorneys interweave these arguments with those based on two different types of mitigating evidence.

### **1. Examples of Lingering Doubt Arguments**

In some cases, an experienced capital defense attorney will decide to argue lingering doubt only if the jury's lengthy deliberations at the guilt stage signal that at least some of the jurors had doubts as to the defendant's guilt of the capital offense.<sup>169</sup> When the jury's deliberations indicate the possibility of such doubts, the defense attorney will advert to the jury's deliberations in her closing argument, explaining to the jurors that, if any of them had doubts as to the defendant's guilt for the capital offense, this provides a reason why they should vote against the death penalty.

This kind of argument can be effective even if the issue that precipitated lengthy jury deliberation related to the defendant's degree of guilt rather than his total innocence. In a case involving William Brooks, a young African American charged with robbing, raping, and intentionally shooting to death a young white woman, for example, Brooks'

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<sup>169</sup>Bright Interview, *supra* note 117.

attorney, Stephen Bright, did not dispute that Brooks had robbed, raped, and shot the young woman, causing her death. The defense did maintain, however, that the shooting was accidental rather than intentional. At the guilt trial, the jury adjudicated Brooks guilty of capital murder, but only after engaging in lengthy deliberations relating to the question of whether the shooting was intentional or accidental.<sup>170</sup>

In his penalty trial argument, Brooks referred to the jury's lengthy deliberations as a reason why they should not impose the death penalty:

And we told you about the circumstances of the gun going off and you spent a day agonizing over that and I'm sure discussing it back and forth and you came to the decision you came to. But I'd suggest to you, ladies and gentlemen, that part of that struggle is a reason for voting for a life sentence in this case, the fact that it was a close question, a difficult question, a question that obviously some of you had different views about before you came to an ultimate agreement on it. But if there's some lingering question among any of you as to exactly what happened when all those events were going on out there, that's a reason to consider life and vote for life because that goes to the degree of culpability and blameworthiness in this case.<sup>171</sup>

Bright's argument was obviously directed to the members of the jury who earlier had had difficulty in concluding that the defendant had intentionally shot the victim. While not criticizing those jurors' decision to join with the majority in returning a verdict of guilty of capital murder, Bright's argument emphasized that each juror should reconsider whether she had any lingering doubt as to the defendant's guilt and, if she had such a doubt, to use it as a basis for declining to vote for the death sentence.

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<sup>170</sup>Case Example: Presenting a Theme Throughout the Case (Distributed by Southern Center for Human Rights) 9 [hereinafter Case Example] (jury in *Brooks* case deliberated for a day before returning a "verdict of guilty or malice murder").

<sup>171</sup>Case Example, *supra*, note 170, at 23.



When the government's case has obvious weaknesses—a key government witness has been shown to be unreliable, for example—the defense attorney may decide to make a lingering doubt argument in a way that exploits this weakness. In making this argument, the attorney will generally be careful to avoid any express or implied criticism of the jury's verdict. David Bruck observes that, in such cases, he will sometimes begin his argument relating to lingering doubt by telling the jury that, based on the evidence they had to work with and the standard of proof they were required to apply, their verdict was correct or at least reasonable.<sup>172</sup> After thus making it clear that he respects the jury's verdict, Bruck will then explain that the jury should adopt a different perspective in deciding whether the evidence is strong enough to warrant a death sentence.

Bruck's lingering doubt argument on behalf of Paul Mazzell provides an apt example. At Mazzell's guilt trial, the chief government witness was Danny Hogg, who testified under a grant of immunity that he and another man obeyed Mazzell's orders to bring the victim to Mazzell and that Mazzell alone then killed the victim. Hogg's testimony was impeached by his past criminal record, his own admission that he had given false testimony at an earlier trial, and his admission that his grant of immunity would be revoked if he himself had killed the victim.<sup>173</sup> Three witnesses testified that Hogg had in fact killed the victim and the prosecutor acknowledged to the jury that Hogg was not a believable witness.<sup>174</sup> The jury nevertheless convicted Mazzell of capital murder.

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<sup>172</sup>Bruck Interview, *supra* note 115.

<sup>173</sup>State v. Merriman, 337 S.E.2d 218, 227 (S.C. App. 1985).

<sup>174</sup>*Id.*

At the penalty trial, Bruck began his lingering doubt argument as follows:

I want to preface this by saying again that what I'm about to say is not to quarrel with your verdict or say you made a mistake. You took the evidence as it existed in the courtroom during the past week or two; and you, consistent with your oath, applied your good judgment to that evidence, and you found beyond a reasonable doubt that Paul was guilty. And I'm not going to quarrel with that in any way, shape or form.

Bruck then moved to the question of how the jury should approach the evidence in deciding the question before them at the penalty stage:

The evidence presented to you, as it had been pulled together by the State over the last week or two, was guilty; but before you can put this man to death based on that evidence you have to be sure of a fourth thing beyond a reasonable doubt, and that is that the evidence that was given to you and that you had to make do with as it had been pulled together and hammered into shape by the time you had to deliberate, that that evidence will never, never change. And you have to be sure of that beyond a reasonable doubt. Y'all know exactly what I'm talking about.

You have to be sure beyond a reasonable doubt that Mr. Hogg won't come up next month, next week, ten years from now, long after Paul has been executed and buried and, for whatever reasons of his own, his interests having changed, he's not going to come along and say: "Well, I'm kind of embarrassed to say this now, but I didn't tell the truth at the trial." You have to be sure of that because, if Paul was still doing his life sentence in prison and Mr. Hogg happened to say that, something can be done about it; but if he's executed, it can't.<sup>175</sup>

Michael Burt asserts that the argument that evidence of the defendant's guilt "may change" has more resonance today than it did in the past because of jurors' awareness of cases in which convicted defendants have been exonerated. In order to draw on this awareness, capital defense attorneys sometimes explicitly refer to cases in which defendants convicted of capital crimes were later exonerated. The attorney may begin by telling the jury that she respects their verdict but in reaching the judgment that an

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<sup>175</sup>State v. Merriman, *supra* note 173, Record 1993 [hereinafter Merriman Record].

individual is guilty of a crime “we are dealing with human institutions that we know are fallible.”<sup>176</sup> The attorney may then refer to cases in which defendants convicted of crimes were later exonerated and state that in those cases the government’s evidence seemed to establish the defendants’ guilt and the juries that convicted those defendants were convinced that their verdicts were correct.<sup>177</sup>

In some cases, the attorney will seek to draw even closer parallels between the present case and prior wrongful convictions. When the prosecution’s case has obvious weaknesses, Bruck will tell the jury that in cases in which convicted defendants were later exonerated there were “always warning signs.”<sup>178</sup> He will then explain some of the types of evidence that constitute warning signs—government witnesses who change their stories, for example, or disputed forensic evidence—and show that those same warning signs are present in the case before them.<sup>179</sup>

In arguing lingering doubt to the penalty jury, an experienced capital defense attorney will often assert that the jury should not impose the death penalty unless they find that the government’s evidence meets a higher standard of proof than the beyond a reasonable doubt standard which governed their deliberations at the guilt stage. Michael Burt states that in California, a capital defendant’s attorney will sometimes begin orienting jurors as to the differing standards of proof at the voir dire stage.<sup>180</sup> The

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<sup>176</sup>Burt Interview, *supra* note 119.

<sup>177</sup>Bruck Interview, *supra* note 115; Burt Interview, *supra* note 119.

<sup>178</sup>Bruck Interview, *supra* note 115.

<sup>179</sup>*Id.*

<sup>180</sup>Burt Interview, *supra* note 119.

attorney may even use one or more diagrams to illustrate the different standards of proof required at different stages of the proceedings, including perhaps reasonable suspicion to detain the defendant, probable cause to arrest him, proof beyond a reasonable doubt to convict him of the capital offense and proof beyond *any* doubt to sentence him to death.<sup>181</sup> After the defendant has been convicted of the capital offense, the attorney at the penalty trial will then refer to the earlier schematic presentation and remind the jury that they should not impose the death penalty unless the evidence of guilt meets the most stringent standard. In some California cases, this argument will be especially effective because the trial judge's lingering doubt instructions will reinforce the attorney's argument that the prosecution's evidence of guilt should be required to meet a higher standard of proof at the penalty stage.<sup>182</sup>

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<sup>181</sup>*Id.*

<sup>182</sup>*See, e.g.,* People v. Cox, 809 P.2d 351, 386 (Cal. 1990) (Holding that a jury instruction on lingering doubt may be required by statute if warranted by the evidence.). *But see* People v. Medina, 906 P.2d 2, 29 (Cal. 1995) (Jury may consider lingering doubts in penalty phase, but there is no federal or state constitutional right to a jury instruction.). In some California cases, judges have instructed the penalty jury as follows:

Although proof of guilt beyond a reasonable doubt has been found, you may demand a greater degree of certainty for the imposition of the death penalty. The adjudication of guilt is not infallible and any lingering doubts you entertain on the question of guilt may be considered by you in determining the appropriate penalty, including the possibility that at some time in the future, facts may come to light which have not yet been discovered.

Alternatively, counsel may request a special separate instruction, such as the following instruction requested in the case of *People v. Henderson*, 275 Cal. Rptr. 837, 839 (Cal. Ct. App. 1990):

Each individual juror may consider as a mitigating factor residual or lingering doubt as to whether defendant intentionally killed the victim. Lingering or residual doubt is defined as the state of mind between beyond a reasonable doubt and beyond all possible doubts.

Even when they expect no help from the judge's instructions,<sup>183</sup> however, experienced capital defense attorneys will still sometimes argue that the jury should apply a higher standard of proof before imposing a death sentence. In some jurisdictions, the prosecutor may object to this argument on the ground that a juror's lingering doubt as to the defendant's guilt does not constitute a mitigating factor that may be considered by the penalty jury.<sup>184</sup> But even if the judge sustains a prosecutor's objection, the defense may benefit. The objection will call the jury's attention to the issue of lingering doubt and perhaps signal to them that the prosecutor does not believe that his case has been proved beyond *any* doubt. The prosecutor's objection, moreover, may give the defense attorney

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Thus if any individual juror has a lingering or residual doubt about whether the defendant intentionally killed the victim, he or she must consider this as a mitigating factor and assign to it the weight you deem appropriate.

Email from Michael Burt on 3/26/2003.

<sup>183</sup>In most jurisdictions, the judge will not instruct the penalty jury that their lingering doubt as to the defendant's guilt may be considered as a mitigating circumstance. See *Franklin v. Lynaugh*, 487 U.S. 164, 172-73 (1988); *Melson v. State*, 775 So. 2d 857, 898 (Ala. Cr. App. 1999); *Ruiz v. State*, 772 S.W.2d 297 (Ark. 1989); *Overstreet v. State*, 783 N.E.2d 1140, 1163 (Ind. 2003); *Tamme v. Commonwealth*, 973 S.W.2d 13, 38 (Ky. 1998); *Holland v. State*, 705 So. 2d 307, 326 (Miss. 1997); *Evans v. Nevada*, 926 P.2d 265, 284 (Nev. 1996); *New Jersey v. Josephs*, 803 A.2d 1074, 1116 (N.J. 2002); *State v. Garner*, 656 N.E.2d 623, 632 (Ohio 1995); *Bernay v. State*, 989 P.2d 998, 1012 (Okla. 1999); *State v. Rogers*, 313 P.2d 1308, 1328 (Or. 1992); *State v. Bigbee*, 885 S.W.2d 797, 813 (1994); *Stockton v. Commonwealth*, 402 S.E.2d 196, 211 (Va. 1991).

<sup>184</sup>Courts that have considered the question have generally held (or stated in dicta) that a capital defendant is not entitled to have the judge charge the penalty jury that their lingering doubt as to the defendant's guilt may be considered as mitigating evidence. See *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988) (dicta); *State v. McGuire*, 686 N.E.2d 1112 (Ohio 1997); *State v. Fletcher*, 555 S.E.2d 534, 544 (N.C. 2001); *Holland v. State*, 705 So. 2d 307 (Miss. 1997); *State v. Harris*, 676 N.Y.S.2d 440, 443 (N.Y. Gen. Term 1998).

an opportunity to reinforce to the jury the message that it has the ultimate responsibility for deciding whether a death penalty should be imposed.

In the *Mazzel* case, for example, after pointing out to the jury that it was possible that the chief government witnesses might later change his story,<sup>185</sup> Bruck added that he didn't know whether that would happen. When he next addressed the level of proof the jury should require to sentence the defendant to death, the prosecutor objected:

Mr. Bruck: But before you put a man to death on their testimony, you have to be sure beyond all doubt that it will never happen. And that's ridiculous. Who can be sure of that beyond all doubt?

Mr. Stoney: Your honor, I object. The law is not all doubt. It's a reasonable doubt, you Honor.

The Court: Reasonable doubt, Mr. Bruck.

Mr. Bruck: Yes, sir. *The amount of doubt that you feel you're willing to tolerate before you put a man to death, of course, is between you and your own conscience.* And I won't go into that anymore.<sup>186</sup>

Bruck, however, did further refer to the subject of the requisite standard of proof. After talking about mistakes that have been made in the court system, he emphatically stated, "The death penalty is for cases where there can't have been any kind of mistake, and this is just not such a case."<sup>187</sup> After explaining why *Mazzell's* case was not one in which there couldn't have been a mistake, moreover, Bruck adverted to the prosecutor's earlier objection, using it to emphasize the jury's responsibility for determining whether a death sentence should be imposed:

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<sup>185</sup>See *supra* note 175 and accompanying text..

<sup>186</sup>Merriman Record, *supra* note 175, at 1993-94 (emphasis added).

<sup>187</sup>*Id.* at 1995.

Mr. Stoney jumps up and objects and says: “Well, its not beyond all doubt. Its just beyond a reasonable doubt.” Well, that’s fine for him to say, and that’s fine for the law to say; but the responsibility for whether Paul Mazzell lives or dies is not on Mr. Stoney. Its not even on Judge Fields. It’s on each individual one of you.<sup>188</sup>

Through this argument, Bruck effectively communicated to the jury the reasons why it would be appropriate for them to decline to impose the death penalty unless the prosecutor established the defendant’s guilt beyond any doubt.

## **2. Two Penalty Trial Arguments**

Excerpts from two penalty trial arguments provide a fuller picture of the strategic choices skilled defense attorneys make when presenting a lingering doubt argument. In particular, the arguments in these two cases—one from California and one from New York—illustrate the ways in which different attorneys direct the jury’s attention to the issue of lingering doubt, interweave arguments relating to lingering doubt with arguments based on the introduction of mitigating evidence, and highlight the importance of humanizing the defendant so that the jury will have a reason to spare his life.

### ***The Henderson Case***

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<sup>188</sup>*Id.* at 1996.

The penalty trial of Philip Henderson, who was convicted of capital murder in California, provides an illustration of a case in which a defense attorney's argument relating to lingering doubt was presented in a jurisdiction that allows the fullest consideration of lingering doubt as a mitigating factor. Henderson, who was represented by Michael Burt and James Pagano, was charged with four counts of first degree murder and one count of auto theft.<sup>189</sup> The prosecution's evidence showed that Ray and Anita Boggs, their one-year-old child, Ray, Jr., and Anita Boggs' unborn fetus<sup>190</sup> were found dead on or about February 28, 1982 in the area underneath their apartment (which was on stilts) and in the backyard of the apartment building. Ray Boggs had been shot to death and his wife had been strangled.<sup>191</sup> The Boggs family had been killed about six weeks earlier, during the second week of January, 1982, and items belonging to them had been taken from their apartment at the time of their death.<sup>192</sup>

The police investigating the case determined that Philip Henderson and his wife Velma had been staying at the Boggs' apartment in January, 1982. When contacted by the police, Henderson told them he and his wife had last seen the Boggses on January 11, the day on which the Hendersons left San Francisco to go to Florida. Henderson did not tell the police that he had taken Boggs' property or that he had noticed anything unusual in the apartment before he and his wife left for Florida.

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<sup>189</sup>People v. Henderson, 275 Cal. Rptr. 837, 839 (Cal. Ct. App. 1990).

<sup>190</sup>CAL. PENAL CODE § 187(a) (Deering 2003).

<sup>191</sup>Henderson, 275 Cal. Rptr. at 840-41.

<sup>192</sup>Id. at 840-41.



The police then discovered that Henderson and his wife had sold property that belonged to Ray Boggs during their trip to Florida.<sup>193</sup> In addition, witnesses noticed that Henderson had had in his possession a .22 caliber long rifle that was similar to a rifle that belonged to Boggs.<sup>194</sup> A criminalist testified that the bullet retrieved from Ray Boggs' brain was fired from a .22 caliber long rifle. While the expert could not positively identify the rifle possessed by Henderson as the one that had fired the bullet, he testified that the identifying characteristics of a bullet fired from that gun were "consistent with the characteristics found on the bullet which killed Ray Boggs."<sup>195</sup>

Henderson testified in his own defense. He denied the murders but admitted that he and his wife stole Boggs' property on January 11. He testified that Boggs was involved in selling drugs and that on one occasion he had been threatened by two men, including one called "Hawaiian Jimmy," who beat Boggs on the head with a cane. He testified that he and his wife decided to leave for Florida because they became frightened by Boggs' drug business and the violence that accompanied it.

Henderson claimed that on January 11 he and his wife had helped Ray Boggs look for Boggs' wife, who was missing. When they returned to the Boggs' apartment that evening, the apartment was in disarray and Ray Boggs' rifle was off the rack and leaning against the wall. The Hendersons became frightened by the circumstances and decided this would be a good time to leave. Because they had little money, "[t]hey decided to

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<sup>193</sup>*Id.* at 842.

<sup>194</sup>*Id.* at 842-43. One of these witnesses also testified that Henderson told him that he and his wife were "on the run." *Id.* at 843.

<sup>195</sup>*Id.*

steal the Boggs' property."<sup>196</sup> Among other things, they took Ray's rifle and truck. Later, Henderson sold some of the stolen property. He admitted that he initially lied to the police about his activities, his reason being that he did not want to be prosecuted for stealing Boggs' property.

In order to rebut the defense's suggestion that people associated with Boggs in selling drugs might have murdered him, Edward Ramos, also known as "Hawaiian Jimmy," testified for the prosecution on rebuttal. Ramos admitted threatening Boggs with physical injury because Boggs owed him money for work he had done on Boggs' truck; but he claimed that he never hit Boggs and that Boggs had paid him at least part of the money he owed by giving him a \$50 check on January 7, 1982.<sup>197</sup>

After five or six days of deliberations, the jury found Henderson guilty of two counts of capital murder and several lesser crimes. Because the defense had presented a strong claim of innocence at the guilt trial, Henderson's attorneys decided to present evidence and argument relating to lingering doubt at the penalty trial.

During the penalty trial, the defense introduced evidence relating to the defendant's guilt that had not been admitted during the guilt trial. Most significantly, Rose Marie Hunt, who was close friends with the Boggesses, the godmother to the Boggesses' one-year-old child, and knew not only the Hendersons and the Boggesses but also the other people who were associated with both families during the period when the murders occurred, was allowed to give her opinion as to the appropriate penalty for Henderson. She testified

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<sup>196</sup>*Id.* at 844.

<sup>197</sup>*Id.* He also testified that "[a] few weeks later" he attempted "to collect the rest of the money [Boggs] owed." *Id.*

that in her opinion Mr. Henderson should be given a life sentence because “there’s other parties involved in this that hasn’t been brought forth.”<sup>198</sup> Asked to explain, she broke down in tears and testified from her wheelchair, “I believe that if he’s executed in the gas chamber he may be executed as an innocent victim. And I believe at that time when the true people have (been) found out, there will be no way to bring him back to life like there is no way to bring my friends back to life. I believe that if he is put to life imprisonment without possibility of parole, that if he is guilty, then he’s punished. If he is not guilty, he has the possibility of coming out and the real people being convicted.”<sup>199</sup> She also quite dramatically testified that, following her testimony in the guilt phase for Mr. Henderson, her life had been threatened by one of “Hawaiian Jimmy’s” friends.<sup>200</sup> Other witnesses who knew Henderson also testified that in each of their opinions Henderson was not guilty of the killings that had been committed.<sup>201</sup>

During his closing argument at the penalty trial, the prosecutor specifically addressed the issue of lingering doubt. He first referred to the testimony of the witnesses who expressed the opinion that Henderson was not guilty. He argued that these witnesses lacked the knowledge necessary for an informed opinion. He pointed out that some of the witnesses could not assess the defendant’s propensities at the time of the crime

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<sup>198</sup>People v. Henderson, *supra* note 188, Record 6955 [hereinafter Henderson Record].

<sup>199</sup>Henderson Record, *supra* note 198, at 6957.

<sup>200</sup>Email from Michael Burt to author dated 8/21/03 on file with author [hereinafter Burt email].

<sup>201</sup>Burt Interview, *supra* note 118.

because they had not seen him for many years.<sup>202</sup> In the case of Ms. Hunt, he emphasized that she had not attended the guilt trial. He then said:

She didn't listen to the evidence. She didn't consider that evidence. That's like someone being a Monday morning quarterback who didn't even watch the game the day before. I object to that. I think that's real inappropriate.<sup>203</sup>

After thus seeking to dismiss the testimony of the defense's lingering doubt witnesses, the prosecutor argued that the jury's verdict at the guilt stage should preclude the defense from establishing lingering doubt as a mitigating factor:

Now, if there is a doubt in your mind, I like to think—I like to think that you'll resolve that in the guilt phase. And I think you did on certain of the offenses. I think you gave the defendant every benefit of every doubt that he was ever able to get. . . . But I submit to you any doubt was resolved in that jury room in the guilt phase. And I'll submit to you that it's rather, it's rather a strong word, and I apologize, but it's rather insulting to get up here and say may be you were wrong, just may be you were a tiny bit.<sup>204</sup>

Consistent with the empirical data relating to capital jurors' attitudes,<sup>205</sup> the prosecutor's assertion that defense counsel's lingering doubt argument was “insulting” seemed designed to lead the jury to weigh that argument against the defendant because it represented a refusal on the part of the defense to accept the jury's verdict.<sup>206</sup>

The prosecutor's primary argument, however, was that the jury should view their verdict at the guilt stage as foreclosing any doubts as to the defendant's guilt. After

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<sup>202</sup>Henderson Record, *supra* note 199, at 7152 (witnesses basing their opinion on “someone they knew ten years ago, 15 years ago, 19 years ago in the case of Mr. Comorato [who] knew the defendant when he was ten years old”).

<sup>203</sup>*Id.* at 7153.

<sup>204</sup>*Id.* at 7154.

<sup>205</sup>See *supra* notes 153-54 and accompanying text.

<sup>206</sup>See *supra* notes 151-52 and accompanying text.

characterizing the lingering doubt argument as insulting, the prosecutor returned to this theme:

People have to make decisions. If we never made decisions, we would never move. Some of you in occupations make decisions, life and death decisions on a daily basis. You have to make decisions. You made your decision, let's go with it now. If you going to return a verdict of life without possibility of parole, I hope you do it for other than lingering doubt. I think that is selling yourself short. That is a cop out.<sup>207</sup>

The prosecutor thus continually sought to reinforce the idea that, through its verdict at the guilt stage, the jury had resolved all doubts against the defendant.

Defense counsel James Pagano, who had not participated in the guilt trial but was the primary attorney during the penalty trial,<sup>208</sup> made the final argument to the penalty jury.<sup>209</sup> Early in the argument, Pagano referred to the jury's lengthy deliberations, observing that it showed they were "serious about [their] job."<sup>210</sup> A little later, he specifically responded to the prosecutor's argument relating to lingering doubt, emphasizing that a higher standard of proof should be required to impose the death penalty:

And in spite of what counsel said, lingering doubt is very valid here especially in the facts and circumstances of this case. . . . You can find somebody guilty beyond a reasonable doubt, we explained that to you in the voir dire. There is that higher area, just that little bit more. And they allow you because this is the death penalty case.<sup>211</sup>

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<sup>207</sup>Henderson Record, *supra* note 198, at 7154-55.

<sup>208</sup>Burt email, *supra* note 200.

<sup>209</sup>In California, the defense always has the opportunity to make the final penalty trial argument in a capital case. *Id.*

<sup>210</sup>Henderson Record, *supra* note 198, at 7171.

<sup>211</sup>*Id.* at 7173.

Consistent with David Bruck's approach,<sup>212</sup> Pagano next asked the jury to visualize how the case might look to them in the future:

And you can say yes, I believe I found this is the guy, that did it beyond a reasonable doubt, but would you five years from now, ten years from now, 20 years from now, this is the guy that did it, he really did it.<sup>213</sup>

Having developed the framework for arguing lingering doubt, Pagano proceeded to argue that specific aspects of the case "cried [out] for lingering doubt."<sup>214</sup> He argued, for example, that the jury should give weight to Rose Marie Hunt's opinion:

[N]obody knows the cast of characters that hung out at 753 Webster Street or that other milieu down at Jack In The Box better than Rose Marie Hunt. And the child's godmother is telling you you may have the wrong person here, better give it some attention.<sup>215</sup>

He also argued that, in view of the circumstantial nature of the government's case, the jury should give weight to the witnesses who testified as to Henderson's non-violent character:

There is no smoking gun here and it is circumstantial evidence. Mr. Henderson was on trial. It was reasonable for you to conclude, perhaps, what you did. But now in the penalty phase you've got to know a little bit more about Phil Henderson.<sup>216</sup>

During the rest of his argument, Pagano talked primarily about the defense witnesses who had testified on Henderson's behalf at the penalty trial. Since this testimony could

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<sup>212</sup>See *supra* notes 172-75 and accompanying text.

<sup>213</sup>Henderson Record, *supra* note 198, at 7173.

<sup>214</sup>*Id.* at 7174.

<sup>215</sup>*Id.* Rose Marie Hunt was the godmother of Boggs' slain child. Burt Interview, *supra* note 119.

<sup>216</sup>Henderson Record, *supra* note 198, at 7177.

accurately be characterized as “good guy” evidence,<sup>217</sup> Pagano was able to effectively interweave two interrelated arguments: the witnesses’ testimony showed that Henderson’s was “a life worth sparing” and that “[t]here [was] a lingering doubt” as to his guilt.<sup>218</sup>

During the latter part of his argument, Pagano focused primarily on the penalty trial evidence relating to Henderson’s background and character. He talked about Henderson’s life, including the people who cared about him, his non-violent character and his kindness to children. Through this argument, Pagano sought to humanize Henderson and to convince the jury that his life was worth sparing. Pagano also referred to testimony that indicated Henderson would not be a threat to anyone if he were incarcerated for life.<sup>219</sup> He ended by urging the jury to accept the alternative of life imprisonment in this case.<sup>220</sup>

In accordance with California law, the judge instructed the jury that, in deciding whether the defendant should be sentenced to death, one of the mitigating factors they could consider was “any lingering doubt you may have about his guilt.”<sup>221</sup> After a relatively short deliberation, the jury returned a sentence of life without possibility of parole.<sup>222</sup>

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<sup>217</sup>See *supra* notes 160-61 and accompanying text.

<sup>218</sup>Henderson Record, *supra* note 198, at 7172-85.

<sup>219</sup>*Id.* at 7188.

<sup>220</sup>*Id.* at 7194.

<sup>221</sup>*Id.* at 7205.

<sup>222</sup>Burt Interview, *supra* note 119.

### **The *McIntosh* Case**

The penalty trial of Dalkeith McIntosh, who was convicted of capital murder in New York, is noteworthy for at least two reasons: first, the defense's counsel lingering doubt argument was unorthodox but highly effective, thus demonstrating that skilled capital defense attorneys will adopt different approaches depending on myriad circumstances, including the attorney's sense of the rapport she has been able to establish with the jury; second, the case provides a striking example of one in which the defense elected to introduce "double-edged" mitigating evidence at the penalty trial and the defense attorney's closing argument, which interweaved appeals to "lingering doubt" with a narration of the defendant's history, provided powerful support for the axiom that, whether or not there is an issue of lingering doubt, mitigating evidence explaining the defendant's background and history must be presented to the penalty jury.

McIntosh was charged with two murders and felonious assault. The prosecution claimed that he shot his estranged wife, who was a corrections officer, one of her daughters and her six-year-old grandson. While the six year old survived and testified against McIntosh, the two women died. McIntosh had previously been charged with assault in a domestic incident involving his estranged wife; the prosecution's theory was that McIntosh killed his wife to prevent her from testifying against him in the assault case and then shot the others because they witnessed his murder of his wife.<sup>223</sup> McIntosh also had several other prior convictions, including at least one for assault and battery and some for marihuana offenses.<sup>224</sup>

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<sup>223</sup>Email from Russell Stetson on 7/3/03 on file with author.

<sup>224</sup>Stetler Interview, *supra* note 124.



The shootings took place on a secluded street in a sparsely populated area just outside Poughkeepsie, New York. At the time of the shooting, the three victims were in a Volkswagen bug, which was stopped in the middle of the street. A motorist driving in the opposite direction arrived just as the shooter, a black male, fled into a wooded area on the large grounds of a closed state psychiatric hospital. Police responded quickly. About a half hour later, an officer on the opposite side of the hospital grounds saw McIntosh walking toward town through a swamp. When he asked McIntosh to stop, McIntosh ran and the pursuing officer eventually placed him under arrest.

The six-year-old witness identified McIntosh as the shooter. McIntosh's principal trial attorney, William Tandy, argued that this child, who had a long history of mental and emotional disorders, was highly vulnerable to suggestion and that the circumstances under which he identified McIntosh made the identification unreliable. To support the child's identification, the government also presented evidence that, more than a year after the crime, an environmental clean-up crew clearing the swamp where McIntosh was seen by the police found a no-longer-operable handgun and an FBI analyst testified that the bullet lead in this handgun matched the lead in the slugs that killed the victims. Since the swamp had been thoroughly searched at the time of McIntosh's arrest, Tandy vigorously attacked the government's effort to establish a connection between McIntosh and the newly discovered murder weapon. At the conclusion of the guilt trial, McIntosh was convicted of four counts of capital murder.<sup>225</sup>

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<sup>225</sup>Two involved the intentional murder of his estranged wife and her daughter in the same transaction that involved the intentional murder of the other, see N.Y. PENAL LAW § 400.27(3) (Consol. 2003), and two involving the intentional killing of his estranged wife's daughter to prevent her from testifying as a witness to the murder of his estranged wife and the attempted murder of her grandson. See N.Y. PENAL LAW § 400.27(3) (Consol. 2003).

At the penalty trial, Tendy made both the opening statement and closing argument to the jury. Early in his opening statement, he told the jury he was “going to be honest with” them and “do things some people told me not to do.”<sup>226</sup> He then said,

I disagree with your verdict. I have to say that. I know I’m not supposed to. I know it’s not something you want to hear, but its something I’m going to say. I have tried to be as honest with you as I can. I hope you respect that. I know you have been honest with us, especially with me, and I respect that as well. So I accept your verdict. I have to. I’m no use to this man if I don’t. I accept it. I understand it, I respect it, but I disagree with it.<sup>227</sup>

As Tendy indicated, his statement was contrary to the orthodox view that the defendant’s attorney should not risk antagonizing the penalty jury by expressing disagreement with their verdict.<sup>228</sup> By emphasizing his “respect” for the jury and their verdict, however, Tendy sought to deflect any hostile reaction to his statement. Since he had already established a good rapport with the jury, moreover, his openness and candor may have had the effect of enhancing rather than diminishing the jury’s confidence in him.

After some further comments relating to his disappointment with the jury’s verdict,<sup>229</sup> Tendy stated that the purpose of the penalty trial was “to decide if this man

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<sup>226</sup>People v. Dalkeith McIntosh, State of New York, County Court, Dutchess County, Index #1996/4530 Superseding Indictment #146/96, Before Hon. George D. Marlow, County Court Judge, Tendy’s Opening Statement in Penalty Trial 27 [hereinafter Tendy’s, Opening Statement].

<sup>227</sup>Tendy’s Opening Statement, *supra* note 226, at 28.

<sup>228</sup>See *supra* notes 173-75 and accompanying text.

<sup>229</sup>At Tendy’s request, the judge asked the jury whether the fact that they had rejected Tendy’s arguments during the guilt stage would affect their ability to listen to his arguments at the penalty stage. Tendy’s Opening Statement, *supra* note 226, at 30. In addition to explaining his feelings about the jury’s verdict, Tendy in his opening statement elaborated as to the significance of this question. *Id.*

lives or dies.”<sup>230</sup> In explaining how the jury should approach this decision, he referred to the fact that a juror’s lingering doubt could be a basis for voting against the death penalty.<sup>231</sup> He also told the jury that the defense would present witnesses that would enable them to “learn a little bit about this man.”<sup>232</sup>

Tendy then provided an overview of the defendant’s life story and alluded to the conflict between himself and the defendant with respect to presenting this story to the jury:

It’s a very, very sad story. He doesn’t want it told. This man doesn’t want this story told, he doesn’t want to hear it, and I have taken that decision away from him. There’s some painful memories here. . . . I think . . . that his punishment really began the day that he was born and will continue until the day he dies.<sup>233</sup>

During the penalty trial, the defense presented witnesses who developed the salient details of McIntosh’s sad story, which included an impoverished childhood in Jamaica, horrendous child abuse, and the defendant’s struggles to overcome severe mental and physical problems.

Some of this evidence was certainly “double-edged” in the sense that it might lead the jury to believe that the defendant’s prolonged exposure to abuse and violence would enhance his propensity towards violence, thereby increasing both the jury’s confidence in their earlier guilty verdict and their sense that, if McIntosh’s life was spared, he might be

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<sup>230</sup>*Id.* at 31.

<sup>231</sup>*Id.* at 32.

<sup>232</sup>*Id.* at 34.

<sup>233</sup>*Id.* at 35.

dangerous in the future.<sup>234</sup> Nevertheless, the defense presented McIntosh's tragic life story in graphic detail. In his final argument to the jury, moreover, Tandy emphasized some of the most horrendous aspects of McIntosh's history:

This man was born to a mother who never wanted him and a father who abandoned him. . . . All he ever knew was hatred and cruelty. That's what he was raised on. He had a stutter so bad that he was afraid to speak, and when he did everybody laughed at him, taunted him, and he became so afraid that finally he shut down, stopped talking as child. . . . And brutalized beyond anything that I could ever imagine. Whipped until he was cut and bleeding, whipped with sticks soaked in salt water so when the cuts were there they would burn from the salt. . . . This was a small child. This is mitigation.<sup>235</sup>

Later in his argument, Tandy reiterated that he didn't "believe [McIntosh] committed these crimes."<sup>236</sup> Nevertheless, he also made a powerful statement explaining why McIntosh's tragic history should be relevant to the jury's sentencing decision. He told the jury that to make that decision they needed "to walk in this man's footsteps."<sup>237</sup> In recounting those footsteps, he focused especially on the significance of the brutal child abuse:

If your mother savagely beat you as a child, took out a whip and whipped you with it until your skin bled, until your skin was cut and salt got into the wound and made it burn, if she took a board and beat you with it, took a pot and hit you with it until your head was bleeding, and she took your head and slammed it against walls, and if she took a wooden board with a

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<sup>234</sup>Introducing the evidence, moreover, opened up the possibility that the jury would learn of McIntosh's prior convictions, including his prior conviction for assault and battery. See text at *supra* note 22 and accompanying text.

<sup>235</sup>People v. Dalkeith McIntosh, State of New York, County Court, Dutchess County, Index #1996/4530 Superseding Indictment #146/96, Before Hon. George D. Marlow, County Court Judge, Tandy's Summation in Penalty Trial 28-31 [hereinafter Tandy Summation].

<sup>236</sup>*Id.* at 36.

<sup>237</sup>*Id.* at 39.

nail in it and beat you while your flesh was being cut, telling you she wants you dead, tell me where would you all be right now? You want to talk about a choice?<sup>238</sup>

In this part of the argument, Tendy's point seemed to be that the abuse McIntosh suffered impaired his capacity to govern his conduct, thus reducing his culpability for the crimes he may have committed. Although this argument—and the vivid description of the abuse that supported it—could have had the potential for undercutting Tendy's arguments based on lingering doubt, Tendy obviously believed that that was a risk worth taking. In order to humanize McIntosh, Tendy presented the full history of McIntosh's childhood so that the jury would be able to see not only the man Dalkeith McIntosh but “also that little boy.”<sup>239</sup>

In charging the jury, the judge in *McIntosh*'s case said nothing about “lingering doubt” but, in accordance with New York law, told them that they could return a life sentence even if they found that the aggravating circumstances outweighed the mitigating circumstances. After fairly short deliberations, the jury returned with a sentence of life with no possibility of parole.<sup>240</sup>

## **V. The Standards For Evaluating Strategic Choices by Attorneys Representing Capital Defendants With a Strong Claim of Innocence**

In this Part, I will address the three issues left unresolved by *Wiggins*. Drawing from the material presented in Parts III and IV, I will seek to articulate axioms that govern the strategic choices of experienced capital defense attorneys when they are representing capital defendants with strong claims of innocence. Based on not only the

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<sup>238</sup>*Id.* at 42.

<sup>239</sup>*Id.* at 52.

<sup>240</sup>Stetson Interview, *supra* note 124.

material presented in these Parts but also the ABA Guidelines, lower court cases, and, to some extent, the implications of *Wiggins*' analysis, I will contend that these axioms should also define the standard of care that must be met by an attorney who is representing a capital defendant with a strong claim of innocence.

**A. The Attorney's Obligation to Investigate for Reasonably Available Mitigating Evidence**

In *Wiggins*, the Court placed its imprimatur on the provision of the ABA Guidelines which provides that an attorney representing a capital defendant has an obligation to investigate for "all reasonably available mitigating evidence." In *Wiggins*, of course, it was obvious that the mitigating evidence relating to the defendant's social history was "reasonably available" not only in that it could be obtained but also in that it could be obtained without placing an additional strain on the other resources available to the defense for investigation.<sup>241</sup> In other situations, however, attorneys representing capital defendants with strong claims of innocence may have to confront difficult choices relating to resource allocation.

If the attorney believes that the defense needs substantial resources to support the defendant's claim of innocence, she may know from experience that the judge who allocates resources for defense investigation will not allocate sufficient resources to allow both what the attorney believes is necessary to prepare for the guilt trial and what is necessary to obtain the kind of in-depth social history of the defendant that would produce powerful mitigating evidence. If the judge has already granted the attorney substantial funds for investigation that will support the defendant's alibi, for example, the attorney may know that the judge will not allocate funds for the mental retardation expert

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<sup>241</sup>See *supra* note 96 and accompanying text.

that the defense attorney believes is necessary to provide a meaningful analysis of the mitigating evidence relating to the defendant's possible mental retardation. Or the attorney may know that, given the resources already allocated to the defense, the judge will sharply limit the hourly rate to be paid to a mental health expert, thus rendering it impossible for the defense to obtain the kind of mitigating evidence relating to the defendant's mental impairment that a more highly skilled mental health expert would be able to provide. In these situations, what should be the effect of the attorney's obligation to investigate for "all reasonably available mitigating evidence?"

When the resources available for a capital defendant's defense are limited, the defendant's attorney will undoubtedly have to make difficult decisions relating to resource allocation. The defense attorney's obligation to investigate for available mitigating evidence, moreover, does not mean that she must curtail the investigation relating to the guilt trial in order to fulfill this obligation. The attorney may reasonably decide to obtain funds for a forensics expert that she believes will enhance the defendant's defense at the guilt stage, for example, even if she knows that in practice this will make it impossible for her to obtain the funds necessary to conduct an investigation for mitigating evidence that would allow an adequate inquiry into the defendant's possible mental impairment.

But even if the attorney's choices make it impossible for her to obtain the resources necessary to conduct a full investigation for the potentially available mitigating evidence, she should make a record showing that she has sought such an investigation.<sup>242</sup>

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<sup>242</sup>If the attorney believes allocating resources for the purpose of strengthening the defendant's case at the guilt trial must be the defense's first priority, she will generally be able to make that priority clear through presenting motions relating to these issues prior to her motions that are designed to obtain a full investigation for mitigating evidence.

At a minimum, she should request that the court appoint a social worker (or other mitigation expert) who can conduct a full investigation relating to the defendant's social history. Depending on the circumstances, she should also request funds that will allow an adequate investigation relating to the other areas that, as *Wiggins* noted,<sup>243</sup> the ABA Guidelines have identified as providing sources for mitigating evidence.<sup>244</sup> These include the defendant's "medical history, educational history, employment and training history, . . . prior adult and juvenile correctional experience, and religious and cultural influences."<sup>245</sup> In some cases, for example, the attorney might be able to show the need for a mental health expert to conduct a meaningful investigation into the defendant's medical background or an expert in a specific culture to investigate the effect of religious or cultural influences on his conduct.<sup>246</sup>

Through requesting these resources, the defense attorney would make a record as to the type of investigation she believed to be necessary to present the "available" mitigating evidence. The attorney's request, moreover, would alert the judge as to the extent and nature of potentially mitigating evidence. If the judge denied some or all of the attorney's request and the defendant subsequently received a death sentence, the

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<sup>243</sup>*Wiggins*, 123 S. Ct. at 2537.

<sup>244</sup>*Id.*

<sup>245</sup>*Id.* (quoting AMERICAN BAR ASSOCIATION, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 11.8.6, 133 (1989)).

<sup>246</sup>*See, e.g.,* Mak v. Blodgett, 970 F.2d 614 (6th Cir. 1992) (holding counsel ineffective due to failure to conduct investigation that would have produced, *inter alia*, expert testimony about the difficulty of adolescent immigrants from Hong Kong assimilating to North America; this evidence would have humanized the defendant and could have resulted in a life sentence, even though the defendant had been convicted of 13 murders).



defense would then be able to raise on appeal the question whether the capital defendant was provided with adequate resources to present the available mitigating evidence at the penalty trial. In some cases, the attorney would have a strong argument that, based on *Ake v. Oklahoma*,<sup>247</sup> the court's failure to provide adequate compensation for the experts needed to assist the defense in obtaining "any reasonably mitigating evidence" violated the defendant's right to due process.<sup>248</sup> In all cases, moreover, the attorney would have fulfilled her obligation to seek such evidence and the scope of the system's obligation to provide adequate resources for the necessary investigation would be presented as a question to be decided by the reviewing courts.<sup>249</sup>

**B. The Attorney's Obligation to Investigate for Mitigating Evidence When the Defendant Instructs Her to the Contrary**

The ABA Guidelines directly speak to the situation in which the capital defendant instructs his attorney not to present mitigating evidence at the penalty trial. In a sentence that appears immediately before the portion of the Guidelines relied on in *Wiggins* to establish a capital defense attorney's obligation to investigate for "all reasonably available mitigating evidence," the 1989 Guidelines provide that "[t]he investigation for the preparation of the sentencing phase should be conducted regardless of any initial

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<sup>247</sup>470 U.S. 68 (1985).

<sup>248</sup>See note 97, *supra*.

<sup>249</sup>*Wiggins* appears to recognize that introducing "any available mitigating evidence" will be critical factor for the defense in many, if not most, capital cases. Whether *Ake* requires compensation for the expert requested by the defense should thus depend on whether the defense can make a sufficient showing that the expert is necessary to assist in obtaining or evaluating such evidence.

assertion by the client that mitigation should not be offered.”<sup>250</sup> At least as to a capital defense attorney’s obligation to investigate for mitigating evidence, the *Wiggins* majority appeared to accept the ABA Guidelines as establishing “norms” for competent representation by capital defendants’ attorneys. Unless there is some basis for rejecting the ABA Guidelines’ statement that a capital defense counsel has an obligation to investigate despite her client’s initial instructions to the contrary, this portion of the Guidelines should also be viewed as establishing the standard for competent performance in capital cases.

The strongest argument for rejecting this provision of the ABA Guidelines is that it needlessly interferes with a capital defendant’s autonomy. As I have indicated,<sup>251</sup> a capital defendant has the right to make a binding decision as to what, if any, mitigating evidence will be introduced at the penalty trial. Since the attorney must respect her client’s choice to have no mitigating evidence introduced at the penalty trial, why should it not at least be competent representation for her to comply with the client’s direction not to investigate for mitigating evidence? Arguably, there will be no need to investigate for mitigating evidence if it has already been decided that mitigating evidence will not be introduced at the penalty trial.<sup>252</sup>

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<sup>250</sup>AMERICAN BAR ASSOCIATION, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 11.4.1(c), 93 (1989). In February, 2003, the American Bar Association updated these Guidelines to read “[t]he investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.” AMERICAN BAR ASSOCIATION, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Guideline 10.7.A.2, 76 (2003).

<sup>251</sup>See *supra* note 114 and accompanying text.

<sup>252</sup>As Michael Burt observed, however, investigation for evidence relating to the defendant’s social history will often reveal evidence that will strengthen the defendant’s

The ABA Guidelines seem to be predicated on the view that, unless the attorney conducts a full investigation of potential mitigating evidence prior to trial, the defendant will not be able to make an informed decision as to the sentencing strategy to be pursued at the penalty trial.<sup>253</sup> Lower courts addressing the attorney's constitutional obligation to investigate for mitigating evidence despite the defendant's contrary instructions have focused on this issue.

Citing the ABA Guidelines' language, the Sixth Circuit has held that a full investigation for mitigating evidence "should be conducted regardless of any initial assertion by the client that mitigation is not to be offered."<sup>254</sup> Without citing the Guidelines, the 10th Circuit reached a similar result in a case in which a capital defendant's attorney justified his failure to investigate for mitigating evidence by

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case at the guilt trial. See note 133, *supra* and accompanying text. Since defense counsel cannot predict in advance what this investigation will produce, moreover, she will generally not be able to assess the likelihood that it will yield such evidence. In most cases, the defense attorney should thus be required to insist on at least some investigation for mitigating evidence in order to prepare for the guilt trial in the capital case.

<sup>253</sup>According to the 1989 ABA Guidelines, an attorney must first investigate and "evaluate the potential avenues of action and then advise the client on the merits of each." AMERICAN BAR ASSOCIATION, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Commentary to Guidelines 11.4.1, 96 (1989). The most recent version of the Guidelines states that "[c]ounsel cannot reasonably advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation. AMERICAN BAR ASSOCIATION, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Commentary to Guideline 10.7, 80-81 (2003).

<sup>254</sup>*Coleman v. Mitchell*, 268 F.3d 417, 450 (6th Cir. 2001); *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000).

asserting he was complying with his client's instructions.<sup>255</sup> The Sixth Circuit concluded that, unless the attorney investigated for mitigating evidence, the defendant would have no "understanding of competing mitigating strategies,"<sup>256</sup> and thus be unable to make an informed decision as to the proper sentencing strategy. Similarly, the Tenth Circuit concluded that the defendant would be unable to make an informed choice because the attorney's "failure to investigate clearly affected his ability to competently advise [his client] regarding the meaning of mitigation evidence and the availability of possible mitigating strategies."<sup>257</sup>

Other cases have held, however, that an attorney may comply with her client's directions to abandon investigation for mitigating evidence so long as the attorney adequately advises the defendant regarding the consequences of not investigating.<sup>258</sup> The Ninth Circuit, for example, has held that "a lawyer who abandons investigation into

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<sup>255</sup>See *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (holding defense attorney's failure to investigate for mitigating evidence in compliance with his client's instructions was ineffective assistance because it "affected his ability to completely advise Battenfield regarding the meaning of mitigation evidence and the availability of possible mitigation strategies").

<sup>256</sup>*Coleman v. Mitchell*, 268 F.3d 417, 447 (6th Cir. 2001).

<sup>257</sup>*Battenfield*, 236 F.3d at 1229.

<sup>258</sup>See, e.g., *Williams v. Calderon*, 41 F. Supp. 2d 1043, 1050 (C.D. CA 1998) (holding that a capital defendant's attorney's failure to investigate for mitigating evidence was reasonable when the defendant informed him that no evidence should be presented at the penalty trial and that, before accepting these instructions, the attorney "discussed the purpose of mitigation evidence with [the defendant] and [explained] . . . a what evidence could have been presented"); *Zagorski v. State*, 983 S.W.2d 654, 656 (Tenn. 1998) (holding that a capital defendant's attorney's failure to investigate for mitigating evidence was reasonable when the attorney followed the defendant's instructions to neither investigate nor present mitigating evidence and the defendant remained firm in his instructions even even after the attorney informed him "about the importance of and the need to investigate" for mitigating evidence). See also cases cited in note 263, *infra*.

mitigating evidence in a capital case must at least have adequately informed his client of the potential consequences of that decision and must be assured that his client has made [an] informed and knowing judgment.”<sup>259</sup> When the attorney apprises the defendant “of the importance of presenting mitigating evidence,”<sup>260</sup> the court has determined that the attorney acted reasonably in following the defendant’s decision not to investigate.<sup>261</sup>

Will a capital defendant who has instructed the attorney not to investigate for mitigating evidence be able to make an informed decision relating to sentencing strategy after the attorney fully explains the potential significance of mitigating evidence? It might depend on the reasons for the defendant’s original instructions. A defendant who believes investigating for mitigating evidence is unnecessary because he won’t be convicted of the capital offense obviously presents a different problem than one who prefers a sentence of death over one of life imprisonment. Arguably, the latter defendant is in a better position to make an informed choice relating to sentencing strategy.<sup>262</sup>

But whether the reasons for the defendant’s instructions emanate from his judgment as to the appropriate litigation strategy or his indifference to avoiding

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<sup>259</sup>Hayes v. Woodford, 301 F.3d 1054, 1068 (9th Cir. 2002); *See also* Silva v. Woodford, 279 F.3d 825, 838 (9th Cir. 2002) ( holding that a defendant’s attorney may not “abandon[] investigation into mitigating evidence in a capital case at the direction of his client” unless he “at least ha[s] adequately informed his client of the potential consequence of that decision and [is] assured that his client has made [an] informed and knowing judgment”).

<sup>260</sup>*Id.*

<sup>261</sup>*Id.*

<sup>262</sup>Even if a seemingly competent defendant expresses this preference, his attorney must be alert to the possibility that the defendant may change his mind and that his “choice is made without a full appreciation of the consequences.” Bright Email, *supra* note 117.

execution, the attorney will almost invariably have good reason to believe that the defendant will be unable to make an informed decision with respect to whether mitigating evidence should be presented at the penalty trial until after the attorney has conducted a full investigation for any available mitigating evidence.

If the defendant's instructions are based on the view that mitigating evidence will not assist the defense, the attorney's response should be that, at least in the absence of data gleaned from the investigation, the defendant lacks the knowledge necessary to make that judgment. Prior to the beginning of a capital trial, no defendant—no matter how knowledgeable—will be able to predict whether or not he will be convicted of the capital offense. In the absence of evaluating the mitigating evidence that could be produced at the penalty trial, moreover, the defendant lacks the information necessary to make an informed decision as to whether introducing mitigating evidence at the penalty trial could lead the penalty jury to spare his life.

If the defendant's reason for his instructions is that he prefers execution over life imprisonment or that he prefers execution over subjecting his family and friends to the aggravation of supplying mitigating evidence, determining the scope of the attorney's obligation to investigate for mitigating evidence is more difficult. If a competent capital defendant makes an informed decision to seek execution rather than life imprisonment at the penalty trial, the defense attorney is required to respect that decision.<sup>263</sup> If the attorney's decision to opt for execution in the event of conviction should be viewed as an

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<sup>263</sup>See, e.g., *Zagorski v. State*, 983 S.W.2d 654 (Tenn. 1998). It should follow, moreover, that the attorney should also be required to respect a defendant's informed decision to opt for execution rather seeking a life sentence under circumstances that he views as imposing intolerable burdens for either himself or his loved ones.

informed decision as to the objective to be pursued at the penalty trial, the attorney should thus be required to respect that decision.

A defense attorney should not assume, however, that a capital defendant's pretrial decision to opt for a death sentence at the penalty trial, in the event it occurs, is a fully informed decision. When confronted with a capital trial, a defendant, especially one who claims he is innocent, will be much more likely to be focused on the guilt trial at which he may be acquitted than on a penalty trial, which will take place only if he is convicted of a capital offense. In most cases, it is thus reasonable to assume that the defendant will not be able to make an informed decision as to the objective to be pursued at the penalty trial until the jury's verdict at the guilt trial forces him to confront the reality of that trial.

In order to insure that a capital defendant can make a fully informed decision as to whether to seek a sentence of life imprisonment or death at the penalty trial, the defendant's attorney should thus provide the defendant with the opportunity to make his final decision only after the verdict at the guilt stage forces the defendant to focus on the stark available sentencing alternatives. In order to provide the defendant with a meaningful opportunity to make a decision at this stage, however, the attorney would ordinarily have had to conduct a full investigation for available mitigating evidence prior to the guilt stage. Otherwise, if the defendant's final decision is that he wants to seek a life sentence at the penalty trial, the attorney will not ordinarily have sufficient time to find the mitigating evidence that she would need to introduce in order to maximize the chances of obtaining that objective.

Accordingly, if a capital defendant instructs his attorney prior to trial either not to investigate or to curtail investigation for mitigating evidence, the attorney should

nevertheless have an obligation to investigate for all reasonably available mitigating evidence. Failure to comply with this obligation, moreover, should constitute deficient performance within the meaning of the first prong of the *Strickland* test.

**C. The Attorney's Obligation to Make a Reasonable Strategic Decision Relating to Potential Mitigating Evidence**

*Wiggins*' analysis indicated that a defense attorney's strategic decision to curtail investigation for mitigating evidence because she wants to focus primarily or exclusively on reasserting the capital defendant's innocence at the penalty trial must be subjected to constitutional scrutiny. Justice O'Connor recognized that, prior to conducting a full investigation for mitigating evidence, an attorney may not reasonably conclude that introducing such evidence would be unnecessary or counter-productive because the argument based on the defendant's innocence is so strong. Rather, her opinion recognized that, when the potential mitigating evidence is persuasive and not double-edged, combining the mitigating evidence with evidence or argument relating to the defendant's innocence will be likely to be a more effective sentencing strategy than relying solely on reasserting the defendant's innocence.<sup>264</sup>

Through its citation to earlier cases,<sup>265</sup> *Wiggins* indicated that a capital defendant's attorney's decision to curtail investigation will be a reasonable strategic choice if the attorney's preliminary investigation justifies a conclusion that introducing the potentially available mitigating evidence would be unhelpful or counter-productive. Under what circumstances can an attorney representing a capital defendant with a strong

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<sup>264</sup>See *supra* text at notes 107-09 and accompanying text.

<sup>265</sup>See *Wiggins*, 123 S. Ct. at 2537 (citing *Strickland v. Washington*, *supra*; *Darden v. Wainwright*, 477 U.S. 168 (1986); *Burger v. Kemp*, 483 U.S. 776 (1987)).



claim of innocence reasonably reach this conclusion? More specifically, when may such an attorney reasonably conclude that the investigation for mitigating evidence can be abandoned because the evidence likely to be found will be double-edged in the sense that it may convince the jury either that the defendant's guilt for the offense of which he was convicted is more certain or his potential danger to society is increased?

Based on *Wiggins* itself, a capital defendant's attorney cannot reasonably conclude that introducing mitigating evidence relating to a defendant's troubled childhood or severe mental problems would be so double-edged that the attorney can curtail investigation for such evidence. In discussing the *Wiggins*' attorneys' sentencing strategy, Justice O'Connor emphasized that the mitigating evidence available in *Wiggins* did not show that *Wiggins* had previously engaged in violent conduct.<sup>266</sup> She thus concluded that the evidence "contained little of the double edge"<sup>267</sup> and intimated that introducing it at the penalty trial would have been compatible with their strategy of reasserting the defendant's innocence.

Although *Wiggins* thus suggested that a capital defendant's attorney could make a reasonable strategic decision to curtail investigation for mitigating evidence when the preliminary investigation revealed that the defendant had engaged in prior violent conduct,<sup>268</sup> the ABA Guidelines do not provide that the attorney should abandon the

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<sup>266</sup>*Wiggins*, 123 S. Ct. at 2543.

<sup>267</sup>*Id.* at 2542.

<sup>268</sup>In addition to explaining that the mitigating evidence in *Wiggins* did not show prior violent conduct, the Court also distinguished its holding in *Darden v. Wainwright*. In *Darden*, the Court held that counsel can reasonably curtail investigation when "the decision to present a mitigation case would . . . [result] in the jury hearing evidence that [the defendant] had been convicted of violent crimes and spent much of his life in jail." 123 S. Ct. at 2537. However, *Wiggins*' attorneys "uncovered [nothing] in their

investigation for any such reason.<sup>269</sup> And the material presented in Parts III and IV of this article indicate that experienced capital defense attorneys would certainly not curtail the investigation into the defendant's background because of concerns that tracing his social history would reveal that he engaged in violent or other anti-social conduct.

In the *McIntosh* case, for example, the defendant's attorney certainly had reason to believe that, based on the defendant's prolonged exposure to violence during his childhood, investigation of his background might reveal that he had engaged in violent behavior as an adult. In fact, the investigation for mitigation evidence showed that the defendant had engaged in such conduct and had at least one assault and battery conviction.<sup>270</sup> *McIntosh's* attorneys, however, never considered the possibility of not presenting that mitigating evidence because of a concern that the jury would then view *McIntosh* as a more violent person. Introducing evidence that would provide the jury with a full picture of the defendant's troubled history was an indispensable aspect of their sentencing strategy.

In fact, skilled capital defense attorneys uniformly agree that, regardless of whether the defendant has a strong claim of innocence at the guilt trial, the defense attorney must present mitigating evidence relating to the defendant's background at the penalty trial. If the defendant's background includes prior violent conduct, obviously the

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investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless." *Id.*

<sup>269</sup>The ABA Guidelines state that "[u]nless a plea bargain has resulted in a guarantee on the record that the death penalty will not be imposed, full preparation for a sentencing trial *must* be made in every case." AMERICAN BAR ASSOCIATION, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, Commentary to Guidelines 11.8.1-11.8.6, 134 (1989) (emphasis in original).

<sup>270</sup>See *supra* note 224 and accompanying text.

attorney does not want to emphasize this (or allow the prosecutor to emphasize it) at the penalty trial. Nevertheless, an experienced capital defense attorney would never curtail investigation for mitigating evidence simply because she is aware that it will uncover evidence showing the defendant has engaged in prior violent conduct.

The investigation should be conducted because it may reveal other mitigating evidence that can be introduced without exposing the jury to the defendant's prior violent conduct.<sup>271</sup> Moreover, even if no such evidence is discovered, an experienced capital defense attorney will invariably opt to introduce mitigating evidence that provides the jury with an opportunity to "walk in the defendant's footsteps,"<sup>272</sup> regardless of whether it also exposes them to the defendant's prior violent or anti-social conduct.<sup>273</sup> As Stephen Bright said, if the attorney does not "humanize" the defendant by presenting a nuanced narrative of his past, the penalty jury will be likely to feel that it has no reason to spare the defendant's life.<sup>274</sup>

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<sup>271</sup>In some cases, for example, the defendant's attorney would be able to introduce mitigating evidence relating to the defendant's troubled childhood without opening the door for the introduction of violent acts committed by the defendant when he was an adult.

<sup>272</sup>See *supra* note 239 and accompanying text.

<sup>273</sup>Michael Burt stated that he would not be concerned about introducing background evidence that would expose the jury to the defendant's prior violent conduct unless it "opened up the possibility of the prosecutor admitting aggravating circumstances, that would be commensurate with the crime charged." Burt Interview, *supra* note 119. Thus, the defense should be concerned if admitting mitigating evidence would allow the prosecution to show he had previously been involved in a murder or attempted murder but should not be concerned if the prosecutor could only be able to show that the defendant had previously been involved in burglaries, assaults, or other charges significantly less serious than the capital charge.

<sup>274</sup>See *supra* note 140 and accompanying text.

While *Wiggins* did not hold that a defense attorney representing a capital defendant with a strong claim of innocence can never make a reasonable strategic decision to curtail investigation for mitigating evidence, it indicated that professional norms for capital defense attorneys are expressed in the ABA Guidelines, which in turn reflect the practices of skilled and experienced capital defense attorneys. Based on these norms, an attorney representing a capital defendant with a strong claim of innocence can never make a reasonable strategic decision to curtail investigation for mitigating evidence. Such a decision should invariably constitute deficient performance under the first prong of the *Strickland* test.

## **VI. Conclusion**

Even those who favor the death penalty believe that our system of capital punishment should operate so that the risk of executing an innocent person is minimized. Data showing that innocent defendants have frequently been convicted and sentenced to death has therefore provoked increasing public concern. When so many innocent defendants are on death row, it is almost inevitable that some will not be exonerated in time to avoid execution. As Justice O'Connor stated in a speech given in 2001, "if statistics are any indication, the system may well be allowing some innocent defendants to be executed."<sup>275</sup>

Unfortunately, the strategies employed by some attorneys who represent capital defendants with strong claims of innocence may exacerbate the extent to which innocent defendants are sentenced to death. When an attorney representing a capital defendant

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<sup>275</sup>Maria Elena Baca, *O'Connor Critical of Death Penalty: The First Female Supreme Court Justice Spoke in Minneapolis to a Lawyer's Group*, STAR TRIB. (Minneapolis, Minn.), July 3, 2001.

with a strong claim of innocence focuses primarily or exclusively on seeking to obtain an acquittal at the guilt trial, the attorney's tactics may increase the likelihood that the jury will sentence the defendant to death in the event that they find him guilty of the capital offense. Although a jury's lingering doubt as to the defendant's guilt can be a strong factor in producing a life sentence, defense attorneys are inclined to overestimate the likelihood that the death-qualified jury that convicted the defendant will in fact have a lingering doubt as to his guilt. If the jury has no lingering doubt as to the defendant's guilt and the defense attorney introduces little or no mitigating evidence at the penalty trial, the penalty jury will be likely to conclude that there is no reason to spare the defendant's life. As a result, death penalties are likely to be disproportionately imposed in cases as to which the defendants' attorneys believe the defendants have strong claims of innocence, a pool of cases which, of course, includes many if not most of those in which the defendants are actually innocent.<sup>276</sup>

With respect to monitoring defense attorneys' representation of capital defendants, the Court's decision in *Wiggins* is certainly a positive development. Although *Wiggins*' holding could be confined to the specific ineffective assistance of counsel claim before it in that case, the Court's analysis may have been animated, at least in part, by its recognition of specific concerns relating to the application of our system of

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<sup>276</sup>In some cases involving defendants who are actually innocent, the evidence presented at trial may appear to establish the defendant's guilt beyond any reasonable doubt. This may occur, for example, when the government introduces the defendant's false confession into evidence and the defendant's attorney fails to present any persuasive reasons for disbelieving the confession. For a description of one such case, see Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089 (2001) (describing the case of Earl Washington, Jr., a mentally retarded defendant who was convicted and sentenced to death on the basis of his false confession to the rape and murder of a young woman).

capital punishment, including not only attorneys' inadequate representation of capital defendants but also the risk of executing an innocent defendant. If so, then the fact that *Wiggins* involved a defendant with a strong claim of innocence may have been significant. The Court's holding could provide at least a first step towards decreasing the likelihood that defendants with strong claims of innocence will be sentenced to death, thereby reducing the risk that an innocent person will be executed.

As I explained in Part II, *Wiggins*' holding could be limited in at least three ways: an attorney's obligation to investigate for available mitigating evidence could be defined so as to include only the obligation to investigate for mitigating evidence which can be obtained without placing a strain on existing resources; an attorney's obligation to investigate for mitigating evidence could be limited to situations in which the attorney does not receive contrary instructions from the defendant; and an attorney could be afforded the right to curtail investigation for mitigating evidence on the basis of a strategic decision when she perceives that the evidence likely to be revealed will be double-edged in the sense that it is likely to conflict with her claim that the defendant was innocent of the capital offense.

If *Wiggins* is to be interpreted in a way that will significantly diminish the risk of sentencing innocent capital defendants to death, none of these limitations should apply. As to the attorney's duty to investigate for mitigating evidence, the ABA Standards recognized by *Wiggins* as articulating professional norms for capital defense attorneys, are clearly premised on the view a defense attorney must investigate for any reasonably available mitigating evidence in every capital case. Even if she knows that the court will limit the resources for defense investigation and believes that investigation relating to the

defense at the guilt trial is more important than investigation for mitigating evidence, the attorney should file a motion with the court requesting the appointment of first, an investigator who can trace the defendant's background and social history; and, then, whatever other investigators or experts appear necessary to seek and to render meaningful the available mitigating evidence.<sup>277</sup>

Through filing this motion, the defense attorney will create a record establishing the kind of resources the defense needed to investigate for "all reasonably available mitigating evidence." If the judge denies all or part of this motion, the reviewing courts will then have to confront the questions of whether and to what extent the criminal justice system is required to afford capital defense attorneys resources that will enable them to conduct a full investigation for available mitigating evidence.

In accordance with the ABA Guidelines, a capital defendant's attorney's obligation to investigate for all reasonably available mitigating evidence should also apply regardless of the defendant's contrary instructions. Interpreting the attorney's obligation in this way will ensure that a capital defendant will be able to make an informed decision as to the sentencing strategy to be adopted at the penalty trial, if it occurs. Protecting a capital defendant's right to make an informed choice as to this question is especially important, moreover, when the defendant has a strong claim of innocence because, prior to the guilt trial at which he hopes to be acquitted, such a defendant may be unable to focus on the consequences of adopting a particular sentencing strategy at a penalty trial, which will only occur if his hopes for acquittal are disappointed.

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<sup>277</sup>In some cases, the motion would make it clear that the evidence found by the first investigator will determine whether other experts need to be appointed.

And, finally, while *Wiggins* indicated that a capital defendant can make a reasonable strategic decision to curtail investigation for mitigating evidence, the Court also appeared to recognize that the standard against which such strategic choices must be measured should be one which reflects the practices of skilled and experienced capital defense attorneys. Based on the practices of these attorneys, the following rule should be adopted: an attorney representing a capital defendant with a strong claim of innocence can never make a reasonable strategic decision to curtail investigation for mitigating evidence for the reason that she wants to emphasize the defendant's innocence at the penalty trial. Even if the potentially available mitigating evidence appears likely to be double-edged, the attorney representing such a defendant should conduct a full investigation and, barring very unusual circumstances, should introduce at least some of the mitigating evidence at the penalty trial, if it occurs.

In *Wiggins*, the Court appeared to recognize that by 1989 the norms of practice for capital defense attorneys had evolved to the point where the attorney ordinarily has the obligation to investigate for "all reasonably available mitigating evidence." Through following the provisions of the ABA Guidelines relating to investigating for mitigating evidence, capital defense attorneys can reduce the likelihood that innocent capital defendants will be sentenced to death. And through applying *Wiggins*' holding in ways that reflect the underlying rationale of these Guidelines, courts can take at least a meaningful step towards monitoring attorneys' performance in a way that will reduce the risk of an innocent defendant's execution.